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CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF THE

STATE OF TEXAS

DURING

THE LATTER PART OF THE GALVESTON TERM, 1881,
AND THE AUSTIN TERM, 1881.

REPORTED BY
JACKSON & JACKSON.

VOL. X.

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COURT OF APPEALS OF THE STATE OF TEXAS.

PRESIDING JUDGE:
HON. JOHN P. WHITE.

JUDGES:
HON. C. M. WINKLER.
HON. JAMES M. HURT.

ATTORNEY-GENERAL:[1]
J. H. McLEARY, ESQ.

ASSISTANT ATTORNEY-GENERAL:[2]
HORACE CHILTON, ESQ.

CLERKS:
JAMES L. WHITE, AT AUSTIN.
E. P. SMITH, AT TYLER.
CHARLES S. MORSE, AT GALVESTON.

REPORTERS:
A. M. JACKSON.
A. M. JACKSON, JR.

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[1] Elected at general election, 1880.
[2] Appointed January 20, 1881.

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Allen v. The State	McLennan	Felony	Affirmed.
Applegate v. The State	Grayson	Felony	Affirmed.
Bland v. The State	Rusk	Felony	Affirmed.
Bland v. The State	Rusk	Felony	Affirmed.
Boykin v. The State	Milam	Felony	Affirmed.
Brown v. The State	Dallas	Felony	Affirmed.
Burton v. The State	Wharton	Felony	Dismissed.
Cain v. The State	Rusk	Felony	Affirmed.
Castles v. The State	Brazos	Felony	Dismissed.
Coalson v. The State	Dallas	Felony	Affirmed.
Coalson v. The State	Dallas	Felony	Affirmed.
Day v. The State	McLennan	Felony	Affirmed.
Elwood v. The State	Bexar	Felony	Affirmed.
Fenon v. The State	Liberty	Felony	Affirmed.
Ferguson v. The State	Bastrop	Felony	Affirmed.
Garlington v. The State	Harrison	Felony	Affirmed.
Gooden v. The State	Callahan	Felony	Affirmed.
Greenwood v. The State	Lampasas	Felony	Affirmed.
Lillard v. The State	Dallas	Felony	Affirmed.
Lunsford v. The State	Lampasas	Felony	Dismissed.
Lynch v. The State	Dallas	Felony	Affirmed.
Miles v. The State	Bexar	Felony	Affirmed.
Moore v. The State	Lampasas	Felony	Dismissed.
Royal v. The State	Rusk	Felony	Affirmed.
Shumaker v. The State	Dallas	Felony	Affirmed.
Solomon v. The State	Harris	Felony	Dismissed.
Smith v. The State	Milam	Felony	Dismissed.
Smith v. The State	Milam	Felony	Dismissed.
Thompson v. The State	Harris	Felony	Dismissed.
Travis v. The State	Dallas	Felony	Affirmed.
Wallace v. The State	Erath	Felony	Affirmed.
Blake v. The State	Jasper	Misdemeanor.	Dismissed.
Blake, Jr. v. The State	Jasper	Misdemeanor.	Dismissed.
Bonn v. The State	Galveston	Misdemeanor.	Dismissed.
Fisher v. The State	Grimes	Misdemeanor.	Dismissed.
Frisbie v. The State	DeWitt	Misdemeanor.	Affirmed.
Lerma v. The State	Nueces	Misdemeanor.	Dismissed.
Holliday et al. v. The State	Victoria	Scire Facias	Dismissed.
Walker et al. v. The State	Liberty	Scire Facias	Affirmed.

CRIMINAL CAUSES DECIDED WITHOUT WRITTEN OPINIONS AT THE AUSTIN TERM, 1881.

STYLE OF CASE.	COUNTY.	GRADE OF OFFENSE.	DISPOSITION.
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Bailey v. The State	Brazoria	Felony	Affirmed.
Black v. The State	Collin	Felony	Affirmed.
Britton v. The State	Ellis	Felony	Affirmed.
Clampit v. The State	Franklin	Felony	Affirmed.
Collins v. The State	Harris	Felony	Affirmed.
Crowder v. The State	Galveston	Felony	Affirmed.
Davis v. The State	Harris	Felony	Affirmed.
Dorman v. The State	Ellis	Felony	Affirmed.
Farley v. The State	Denton	Felony	Affirmed.
Fisher v. The State	Harris	Felony	Affirmed.
Fletcher v. The State	Denton	Felony	Affirmed.
Gentry v. The State	Blanco	Felony	Affirmed.
Gordon, Ex Parte	Orange	Felony	Affirmed.
Hannahan v. The State	Uvalde	Felony	Dismissed.
Hardin v. The State	Blanco	Felony	Affirmed.
Harris v. The State	Falls	Felony	Affirmed.
Hill v. The State	Collin	Felony	Affirmed.
Hill v. The State	Kendall	Felony	Affirmed.
Johnson v. The State	Cass	Felony	Affirmed.
Jorasco v. The State	Travis	Felony	Affirmed.
Kirk v. The State	Grayson	Felony	Affirmed.
Kleinert v. The State	Travis	Felony	Affirmed.
Little v. The State	Cooke	Felony	Affirmed.
Mayes v. The State	Cooke	Felony	Affirmed.
Miller v. The State	Tarrant	Felony	Affirmed.
Morrow v. The State	Hays	Felony	Affirmed.
Moseley v. The State	Lamar	Felony	Affirmed.
Ray v. The State	Houston	Felony	Affirmed.
Rivera v. The State	Kinney	Felony	Affirmed.
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Ross v. The State	Galveston	Felony	Affirmed.
Roye v. The State	Walker	Felony	Affirmed.
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Rumley v. The State	Wise	Felony	Dismissed.
Sampson v. The State	Hill	Felony	Affirmed.
Sandlin v. The State	Bell	Felony	Affirmed.
Sargent v. The State	Kinney	Felony	Affirmed.
Taylor v. The State	Lamar	Felony	Affirmed.
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Washington v. The State	Falls	Felony	Affirmed.
Wells v. The State	Hopkins	Felony	Affirmed.
Williams v. The State	Tom Green	Felony	Dismissed.
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Batcheldor v. The State	Young	Misdemeanor	Dismissed.
Beard v. The State	Wise	Misdemeanor	Affirmed.
Berliner v. The State	Grayson	Misdemeanor	Affirmed.
Blackburne v. The State	Cooke	Misdemeanor	Affirmed.
Brown v. The State	Ellis	Misdemeanor	Affirmed.

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STYLE OF CASE.	COUNTY.	GRADE OF OFFENSE.	DISPOSITION.
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Calvert v. The State	Jack	Misdemeanor.	Dismissed.
Cardwell v. The State	Falls	Misdemeanor.	Affirmed.
Chambers v. The State	Hood	Misdemeanor.	Affirmed.
Cooke v. The State	Jack	Misdemeanor.	Dismissed.
Craddock v. The State	Dallas	Misdemeanor.	Affirmed.
Craddock v. The State	Dallas	Misdemeanor.	Dismissed.
Craddock v. The State	Dallas	Misdemeanor.	Dismissed.
Craddock v. The State	Dallas	Misdemeanor.	Dismissed.
Deshea v. The State	Bosque	Misdemeanor.	Dismissed.
Duffy v. The State	Bosque	Misdemeanor.	Dismissed.
East v. The State	Lamar	Misdemeanor.	Affirmed.
Eisenlohr v. The State	Dallas	Misdemeanor.	Affirmed.
Fricke v. The State	Guadalupe	Misdemeanor.	Dismissed.
Graham v. The State	Karnes	Misdemeanor.	Affirmed.
Gregg v. The State	Hood	Misdemeanor.	Affirmed.
Gregor v. The State	Karnes	Misdemeanor.	Affirmed.
Hale v. The State	Bosque	Misdemeanor.	Dismissed.
Hester v. The State	Atascosa	Misdemeanor.	Dismissed.
Humphries v. The State	Bexar	Misdemeanor.	Affirmed.
Joel v. The State	Johnson	Misdemeanor.	Affirmed.
Jones v. The State	Lamar	Misdemeanor.	Affirmed.
Kidd v. The State	Falls	Misdemeanor.	Dismissed.
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Lott v. The State	Johnson	Misdemeanor.	Affirmed.
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Widenhauer v. The State	Bexar	Misdemeanor	Dismissed.
Wilbanks v. The State	Johnson	Misdemeanor.	Affirmed.
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Ziechang v. The State	Williamson.	Misdemeanor.	Affirmed.
Alexander et als. v. The State	Lampasas	Scire Facias	Affirmed.
Collins et al. v. The State	Callahan	Scire Facias	Dismissed.
Duty v. The State	Falls	Scire Facias	Affirmed.
Estelle et al. v. The State	San Saba	Scire Facias	Dismissed.
Goldsby et al. v. The State	Tom Green	Scire Facias	Dismissed.
Heath v. The State	Johnson	Scire Facias	Dismissed.
Heydon et al. v. The State	Lampasas	Scire Facias	Affirmed.
Legard et al. v. The State	Wheeler	Scire Facias	Affirmed.
Morrow et al. v. The State	Karnes	Scire Facias	Dismissed.
Pierce et al. v. The State	Williamson.	Scire Facias	Dismissed.
Williamson et al. v. The State	Hays	Scire Facias	Dismissed.

COURT OF APPEALS OF TEXAS.

GALVESTON TERM, 1881.

Juan Reyes *v.* The State.

10 1
29 612

1. **Murder.**—Evidence tending to show that the killing was done in the perpetration, or in the attempt at the perpetration of either arson, rape, robbery, or burglary, is admissible as part of the *res gestæ*, upon trial of an indictment charging murder by violence and upon express malice aforethought.
2. **Same — Confessions.**— The rule which requires the exclusion of confessions made in arrest refers to confessions of the defendant, and not to statements made by a witness, unless it is made to appear that the witness was under arrest and charged with the offense on trial.
3. **Practice.**—The proper way to supply written testimony of a witness before a coroner's inquest, but since lost, is to introduce witnesses who were present when the witness' testimony was taken before the inquest, and have them testify as to what was deposed. See the opinion for circumstances under which the court properly excluded a copy of written testimony.
4. **Evidence.**—See evidence held sufficient to sustain a conviction for murder in the second degree.

Appeal from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The appellant was convicted of murder in the second degree upon an indictment charging him with the murder of Bruno Hidalgo, on January 1, 1881.

Clothilda Cadena y Hidalgo, wife of the deceased, was the first witness for the State. She testified, in substance, that about ten o'clock on the night of the killing, January 1, 1881, the deceased and the defendant returned from San Antonio to Charles Dignowitty's wood camp, on the Salado. Her husband and herself occupied a tent at that camp. Upon their arrival at the camp on the night in question, the deceased unhitched his horses from his wagon and left them standing near the camp, and he and defendant approached the fire. The deceased handed the witness some money, telling her to put it away, which she did by locking it in a trunk in the tent. After finishing supper at the fire, deceased told witness to bring him the hobbles; that he would hobble his horses on the grass. Witness started for the hobbles, when defendant told her to stop; that he was going to Fort Clark and intended to take the horses with him. The deceased then said to defendant, "The horses are mine; what are you going to take them to Fort Clark for?" Defendant replied, "Because I want to; I am a man and can do it." Thereupon the defendant got up from his seat near the fire, and, going to a tree near by, took from it a butcher knife that had been stuck in it. He placed the knife under his arm, and covered it with a blanket he had thrown around him. Defendant then told his son Gregorio, who was standing near, to get his gun and ammunition and saddle the horses, which Gregorio proceeded to do. The deceased then told defendant that he should not take his (the deceased's) horses, and defendant drew his knife and struck deceased across the mouth with the handle. Witness took her little girl in her arms and begged deceased to leave the camp with her, as she feared defendant would kill him. Witness and deceased started to run, but defendant caught deceased by the arm, and said, "Men don't run; stop and fight me. I am a man, and am going to kill you." Defendant then seized an axe lying near, and with it struck deceased in the forehead, knocking him down. He then called to his son Gregorio for his gun; and, on its being handed him, he shot the deceased. Witness ran on into the woods and heard deceased calling out, "Clothilda! Clothilda! Don't leave me! I am dying!"

The defendant said, "She can do you no good," and, turning the deceased over, again struck him on the head with the axe. After killing the deceased, the defendant broke open the trunk in the tent and took from it the money witness had received from the deceased and put in the trunk. He took also some bed clothing, a bed-tick, and the horses, and left. Witness was on the scene of the murder next day, when an inquest was held on the body of deceased. The body was then lying just as left after the killing.

The cross-examination made no change in the substance of this evidence. She stated that the amount of money handed her by her husband, and placed by her in the trunk, was five dollars. She ran off into the woods while her husband was being killed, and did not see the defendant break open the trunk and take the money and other things. She went back to camp next morning, and found the trunk broken open, and the articles described gone, and that is why she testified that defendant did the breaking and taking. The knife described was a very large, new butcher-knife, with a blade about the length of the witness' arm from her elbow down. It was not a home-made knife. There were two knives in camp, and both were found next morning in camp. The witness denied having testified before the coroner that the deceased was shot before being struck with the axe. With regard to the violence used, she testified before the coroner as she testified on the trial. It was too dark for the witness to see the parties when the defendant struck the deceased the last time, but she knew of the striking by hearing the licks and from what the defendant said at the time. If the deceased owed the defendant any money, the witness did not know it. Witness did testify before the coroner that defendant was drunk on the night of the killing. The parties told her they had been drinking in town. They brought no whiskey to camp, and deceased was not drinking when killed. The defendant was not so drunk that he did not know what he was doing. The witness wandered through the woods all night after the killing, and she denied that she testified before the coroner that she passed the night in the thicket near the camp.

Joe Sheeley, a deputy sheriff of Bexar county, testified for the State that on the morning following the killing, the last witness told him of the killing, and gave him a description of the defendant, and of the horses he had taken. In company with Mr. Nat Lewis, he started in pursuit, having heard of a traveler on what was known as the North Castroville road. About sixteen miles from San Antonio he overtook the defendant and his son, having the horses described in their possession. When arrested, the defendant gave his name as "Pedro Alcorte," and denied knowledge of the murder, and further said that he had never been on the Salado. The witness asked him if his name was not Juan Reyes, and he said that it was not. Besides the horses, the defendant had with him a bed-tick which belonged to deceased.

Peter Shields, the justice of the peace who held the inquest upon the deceased, testified to the appearance of the body when found next morning. There was a gunshot wound in the back, and the skull was crushed in over the eye from the front, and behind. The gun-shot wound was badly powder burned, and appeared to have been inflicted from short range.

Nat Lewis, for the State, corroborated the evidence of Joe Sheeley.

For the defense, Gregorio Reyes, eleven years old, testified that he was the son of the defendant, and that he was in bed when defendant and deceased returned to the camp. He overheard them quarreling outside, and got up and went out. The defendant said that deceased owed him twenty dollars, and demanded its payment. The deceased thereupon attacked defendant with a large home-made butcher-knife, and then the defendant shot him. Defendant then ordered witness to saddle up the horses, which he did. Stripped of detail, this is the substance of the evidence of this witness on his examination in chief.

Cross-examined, the witness averred positively that he did not give the gun to the defendant, but that the latter got it himself from the tent. Witness had not been asleep. He saw the difficulty from the beginning to the end. He saw no axe used at all. From the scene of the killing, he and defendant started to Fort Clark. The witness admitted that he had conversed with Joe Sheeley about this case, but denied that he told Sheeley and Lewis, when his father was arrested, on the Castroville road, that he was asleep at the time of the difficulty, and knew nothing of it, and that he did not hear the report of the gun. He did not tell either Sheeley or Lewis, at any time or place, that he was asleep on the occasion referred to, and that defendant woke him up, telling him that they must go to Las Moras, and that then for the first time he saw the dead body of the deceased. He did not, on an occasion indicated, tell Mr. Lewis that he was asleep at the time and knew nothing of the killing, and that he did not know why he and his father left camp at night. He did not tell Mr. Lewis on that occasion that when he asked his father, the defendant, why they were leaving camp at night, the latter told him that he had had a difficulty with the deceased and was afraid of the sheriffs, nor did he tell Adolph Vidal at any time that he was asleep when the killing occurred. These several parties, on the part of the State, testified that the witness did make the statements he denied.

In answer to a direct question, he affirmed positively that, in a second conversation with Vidal, he did not say that defendant first crushed deceased's skull with an axe, and then burned his mouth with a fagot. Witness heard the deceased call to his wife, "Clothilda! Clothilda! Don't leave me! I am dying!"

The remainder of the evidence is unimportant.

No brief for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

White, P. J. Appellant was tried for the murder of Bruno Hidalgo, charged to have been committed on the 1st day of January, A. D. 1881, in Bexar county. He was convicted on the 27th day of January, 1881, of murder in the second degree, and his punishment was fixed by the verdict and judgment at twenty years' confinement in the penitentiary.

As shown by the first bill of exceptions, the State's counsel "asked the witness Clothilda Cadenas if she was robbed of any money on the night of the killing? and if the defendant had any knowledge of her having any money?" Defendant's counsel objected to the questions on the following ground: "Because the defendant was not charged with robbery in the indictment." As this is the only objection urged to the questions stated in the bill of exceptions, we presume that it was the only ground upon which the evidence was sought to be excluded. This objection was not well taken. The rule is that "when a murder by violence and upon express malice aforethought is charged, then the prosecution may show, as part of the *res gestæ*, that it was also done (if such were the fact) in the perpetration or in the attempt at the perpetration of either arson, rape, robbery, or burglary." *Roach* v. *The State*, 8 Texas Ct. App. 478. This being the only objection to the testimony, the court did not err in overruling it.

The second, third, fourth and fifth bills of exceptions relate to the same subject matter, and may be treated as one. For the purpose of impeaching the defendant's witness, Gregorio Reyes, the county attorney, after laying the proper predicate by stating time, place and circumstances, asked said witness if he had not made such and such statements, to parties who were named, about the murder and matters transpiring at the time of the killing. This testimony was objected to by defendant's counsel upon the ground that at the time said proposed statements were made by the witness, he, the witness, was under arrest. In certifying each of these bills, the judge explains that the evidence showed that the witness was not, at the time the statements were made, under arrest or in duress.

Supposing the witness had been under arrest, this fact would not have rendered the statements inadmissible, unless it were shown that he was under arrest charged with the murder for which he was on trial. Confessions which are excluded as evidence because made whilst under arrest are those which are made *by the defendant.* Code Crim. Proc. arts. 749, 750. Here the statute is sought to be made applicable, not to the confessions of a defendant who is under arrest, but to the statements of a witness who, if at the time under arrest, for aught that the record shows was under arrest for some other offense. The provisions of the statute cannot be strained to such an extent, and were not intended to embrace such statements.

The remaining bill of exceptions is to the refusal of the court to permit defendant's counsel to prove up and read to the jury a copy of the testimony taken upon the coroner's inquest,— the testimony as taken down in writing and certified by the coroner having been lost. The bill of exceptions is too meager to show what the object and purpose of the defendant really was in desiring to read the evidence taken before the coroner; it does not show what testimony was taken before the coroner which it was the desire of the defendant to use. If the testimony of some absent witness was desired, it is not shown who the witness was nor the diligence used. If the object was to supply a lost writing, then the proper steps to admit secondary evidence of its contents are not shown to have been taken. If the object was to furnish testimony either in support of an impeached witness or for the purpose of impeaching a witness, then the proper mode of accomplishing either object, when it was ascertained and shown that the written testimony taken before the coroner was lost, would have been to introduce witnesses who were present at the coroner's inquest, and have had them to testify as to what was at the time deposed by the witness whose testimony was called in question.

It only remains for us to say that we have considered this record carefully in the light of the evidence adduced on the trial, and we are constrained to say that in our opinion the defendant has every reason to congratulate himself upon the mildness of the punishment imposed by a merciful jury. The heartless atrocity of his crime as disclosed in the record finds but few parallels in cases of murder in the second degree. So far as we have been able to ascertain, he has had a most fair and impartial trial, and his punishment is legally and justly awarded him. The judgment of the lower court is therefore in all things affirmed.

Affirmed.

JAMES WILLIAMS *v.* THE STATE.

1. CHARGE OF THE COURT — PRACTICE.— If exception was not taken to an erroneous charge when it was delivered, the error is not cause for reversal unless it was calculated to prejudice the rights of the appellant. The relevancy of the charge to the evidence adduced cannot be considered by this court when the record fails to bring up the facts in proof.

2. **SAME.**—The court below instructed the jury to the effect that they were the judges of the credence due to an impeaching witness as well as the others, and should believe such of the witnesses as they thought most entitled to credit. No exception was taken to the instruction when it was given, and there is no statement of facts. *Held*, that the instruction was not a charge on the weight of evidence, nor ostensibly calculated to prejudice the rights of the defendant. Such efforts, however, to aid the reasoning faculties of the jury, are always unnecessary, and are frequently calculated to prejudice the defendant's rights; and the better practice is to eschew them.
3. **ROBBERY — INDICTMENT.**— Appellant was convicted of robbery on an indictment which alleged a sheep to be the property taken, but contained no allegation of the value of the animal. *Held*, that an allegation of the value was not necessary.

APPEAL from the District Court of Nueces. Tried below before the Hon. JOHN C. RUSSELL.

The indictment charged that the appellant, on or about August 15, 1879, in the county of Nueces, made an assault on one Charles McKenzie, and then and there put the said McKenzie in fear of life and bodily injury, and one certain sheep, the property of one Jane McKenzie, from the possession and against the will of the said Charles McKenzie, then and there holding the said property for the said Jane McKenzie, then and there unlawfully, fraudulently, violently, and with force and arms, did seize and take, with intent to appropriate the same to the use and benefit of him, the said James Williams, without the consent of the said Jane McKenzie, the owner of the said property, or of the said Charles McKenzie, and with the intent to deprive the said owner of the value of the same, contrary, etc.

The jury found the appellant "guilty as charged in the indictment," and assessed his punishment at two years' confinement in the penitentiary. He moved for a new trial on the grounds indicated in the opinion of this court, and also in arrest of judgment because of general insufficiency of the indictment, and specially because it failed to charge that the sheep was of any value. Both motions were overruled, and he appealed from the judgment of conviction. There is no statement of facts.

McCampbell & Givens, for the appellant. The instruction of the court below to the jury — in the third paragraph, to wit: "If there are conflicts in the evidence, it will be your duty to reconcile them if you can; if you cannot, you will then give credit to those witnesses and statements that you may believe most entitled thereto. You are the judges of the credibility of the witnesses by whom a witness is sought to be impeached, as well as all other witnesses who testify before you in the case. All are alike before you for your scrutiny and judgment, and you will decide as to whom you will believe and whom you will not believe as to you seems right under all the surrounding circumstances," allowed the jury arbitrarily to believe or disbelieve any witness or witnesses who testified in the case. Code Cr. Proc. art. 678; *Jackson* v. *The State*, 7 Texas Ct. App. 365; *Pharr* v. *The State*, id. 473; *Johnson* v. *The State*, 9 Texas Ct. App. 558.

This portion of the charge is not alone obnoxious in that it allowed the jury arbitrarily to believe or disbelieve any witness or set of witnesses, but it brings too prominently to the attention of the jury any witness that should be introduced to impeach another, and especially calls their attention to the credibility of the impeaching witness or witnesses; which fact was calculated to arouse the sympathies or excite the passions of a jury. Again, in the latter portion of said paragraph of the charge the jury are instructed to *decide* what witness or witnesses they will believe, and to *decide* what witness or witnesses they *will disbelieve;* thus assuming that some of the witnesses were entitled to belief, while others were not; and thus invading the exclusive province of a jury, who are the exclusive judges of the facts in every criminal cause. Code Crim. Proc. art. 676.

It would seem the better practice for the court to instruct the jury, distinctly setting forth the law applicable to the cause, and leave the jury to arrive at their conclusions by their own mode of reasoning, without any intimation or insinuation on the part of the court that some of the witnesses had sworn falsely and some truthfully; and that they must first find that fact, and then find who or what one testified to the truth, and what one falsely, when in fact the jury may not find it necessary to pass upon the credibility of any of the witnesses, if left to their own mode of arriving at a conclusion from the evidence.

The third and fourth assignments will be considered together. An indictment under the Criminal Code of Texas for robbery should contain all the allegations deemed necessary at common law, or at least substantially conform to a common law indictment for robbery. *Wilson* v. *The State*, 3 Texas Ct. App. 63; *Reardon* v. *The State*, 4 Texas Ct. App. 602; *Skipworth* v. *The State*, 8 Texas Ct. App. 135; Bishop on Statutory Crimes, secs. 518, 519, 520.

Robbery is defined as an aggravated species of larceny. At common law and under our code there is still closer assimilation between robbery and larceny. *Skipworth* v. *The State*, 8 Texas Ct. App. 135.

The indictment should set out a larceny of the goods, the same as in simple larceny. Bishop on Statutory Crimes, p. 159, sec. 518.

The indictment in question falls far short of being sufficient for a simple larceny, in that it fails to allege that the one sheep taken was of value, in order to determine whether the offense was a felony or of less grade. Crim. Code, art. 748.

It is believed that, under the decisions of the appellate courts of our State, on a trial for robbery the defendant may be convicted for theft, according as the jury may find. If so, how important to the rights of the defendant that the value of the property be alleged in the indictment, for upon the value alleged and proven depends the grade of punishment.

It may be insisted that while the indictment is insufficient for theft, still it may be good for the higher grade of offense — robbery. But if the sufficiency of this indictment is to be determined by acknowledged authorities on this subject, it will be found defective in many particulars and essentials. Third vol. Chitty Crim. Law, pp. 806, 807; 1 Whart. Prec. 410; 2 Bishop Cr. Proc. sec. 945; 3 Texas Ct. App. 63; 4 Texas Ct. App. 602.

Our Code uses the word *property* in defining the offense of robbery, art. 722, and the indictment charges robbery of a certain sheep, the property of, etc., omitting any specific value; when by art. of Crim. Code, 732 and 733, personal property must be of value to be the subject of theft, and certainly there can be no robbery of a thing without value. Personal property under our Code has no value judicially known to the court unless proven, and unless alleged could not be proven.

A sheep, under art. 748, Crim. Code, is the subject of theft; but to convict under that article it would be essential to allege the value of the sheep.

"One certain sheep," with no other description of the property, under the common law and the decisions of our own courts, is insufficient to maintain a conviction. Again, there is no allegation in the indictment that the sheep was taken away from the presence of the owner or keeper of the same. For aught that appears from the face of the indictment, the one sheep may not have been removed from the presence of Charles McKenzie, but may have been, immediately after seizing, turned loose in the flock uninjured. True, this might have been for the defense to prove on the trial. Yet, it is urged that the indictment should negative that fact by suitable allegation. *Barnes* v. *The State*, 9 Texas Ct. App. 128.

Thomas Ball, Assistant Attorney General, for the State.

WINKLER, J. This appeal is from a conviction of robbery, with two years' confinement in the penitentiary assessed as the punishment. There are no bills of exception in the record, nor is there any statement of facts.

Two questions were discussed in the brief of counsel for the appellant. 1st. It is urged that the third paragraph of the court's charge is erroneous in that it "allowed the jury arbitrarily to believe or disbelieve any witness or witnesses who testified in the case." The paragraph complained of is as follows: "If there are conflicts in the evidence, it will be your duty to reconcile them if you can; if you cannot, you will then give credit to those witnesses and statements that you may believe most entitled thereto. You are the judges of the credibility of the witnesses by whom a witness is sought to be impeached, as well as all other witnesses who testify before you in the case. All are alike before you for your scrutiny and judgment, and you will decide as to whom you will believe and whom you will not believe, as to you seems right under all the surrounding circumstances."

The charge was not excepted to at the time of its delivery, nor were any additional instructions asked, tending to correct the supposed error. The error complained of was called to the attention of the court for the first time in the motion for a new trial. In this state of the case the rule is thus stated in effect in *Bishop* v. *The State*, 43 Texas, 390: If the charge is not excepted to at the time of the trial, but the objection is presented in a motion for a new trial, the question for the consideration of this court would then be whether or not such a charge was an error which, under all the circumstances, was calculated to injure the rights of the defendant. The rule as thus laid down appears to us to be well-founded in reason and on authority, and has been followed substantially by this court from the date of its creation until the present time. The effect of the rule in its application to the case under consideration is to require this court to inquire whether or not the charge objected to for the first time in the motion for a new trial was an error which, under all the circumstances as exhibited in the record, was calculated to injure the rights of the defendant. If we were called on to refer to any rule of practice or law to support this charge, or to show a necessity for giving the jury such an instruction, we would be inclined to confess an inability to do so. But, on the other hand, it is not perceived in what manner the defendant was injured by it. There being no statement of facts, we are unable to test its appropriateness by anything in the testimony. Some of the expressions might be admissible in relation to certain features of the evidence; but if there were any such features in the case, that fact is not disclosed by the record. It cannot be said that it forms any part of a plain statement of the law of the case, it is true; but it cannot be said to be a comment on the weight of the testimony, nor a summing up of the evidence, nor is it calculated to rouse the prejudice or excite the passions of the jury; nor yet does it direct the jury what witness or class of witnesses they shall believe or disbelieve, by arbitrarily believing one and disbelieving another, especially when considered with reference to the juror's oath and the charge on the presumption of innocence and reasonable doubt.

About all to be said with reference to this charge is that it is an effort on the part of the court to aid the jury in arriving at a conclusion; which had generally better be let alone. The juries will ordinarily reach a more accurate conclusion if left to their own reasoning faculties, than by any attempt on the part of the judges to aid them. Experience has demonstrated the folly and injury which often arises from these attempts to elucidate that which is in itself perfectly plain and unambiguous, and which often lead to such erroneous rulings as compel the reversal of judgments in cases wherein they have occurred. Judges would do better by confining themselves to the plain demands of the law, which are accessible to all. The objection to this charge, coming at the stage of the proceeding it does, seems not to be much more serious than that in *Rideus* v. *The State,* 41 Texas, 199, or that in *Cooper* v. *The State,* 7 Texas Ct. App. 194; which were not deemed of sufficient importance to cause a reversal.

With reference to the indictment, the most important objection urged against it is that it contains no allegation of the value of the property involved in the robbery. The position contended for by counsel for the appellant seems to be based, in part at least, on the idea that the same particularity is required in indictments for robbery as in indictments for theft. Whether the indictment in this case would support a conviction for theft, or not, is not now before us, nor is it a proper question in the case; the conviction being for robbery and not theft. The indictment, it seems, embraces all the elements of the crime of robbery as that offense is defined in the Code. Penal Code, art. 722. That article does not mention the value of the property taken by robbery. The indictment mentions an animal of known value, and is deemed sufficient to apprise the accused, in plain language, as to what he had to meet on the trial.

Believing that there was no error committed on the trial of which the appellant can legally complain, the judgment is affirmed.

Affirmed.

ALLEY MEANS *v.* THE STATE.

1. MESNE PROCESS ON CHANGE OF VENUE.—The Revised Code of Procedure, art. 591, provides that all witnesses already under recognizance or served with process shall be thereby bound, on a change of venue, to appear before the court to which the cause is transferred. New process is not necessary.
2. CONTINUANCE—EVIDENCE.—In a trial for murder the defense asked a continuance in order to obtain proof that other persons besides the defendant had motives and opportunities to have killed the deceased. The inculpatory evidence not being purely circumstantial, it is *held* that the proposed proof was irrelevant and immaterial, and that the refusal of the continuance was not error.
3. MURDER—DECLARATIONS AS RES GESTÆ.—The State was allowed, over objection, to prove that the deceased, while sitting in a church and after gazing out of a window, told a companion that the accused was outside and fixing to kill him (the deceased), and immediately stepped to the door, where he was fired upon and instantly killed. *Held*, that the declaration was *res gestæ*, and was properly admitted in evidence.
4. CHARGE OF THE COURT.—An instruction to the effect that the jury should reconcile conflicts in the evidence, if practicable to do so, and, if not, should give credence to the witnesses they deem most entitled to belief, is superfluous, but not ostensibly on the weight of evidence or otherwise violative of the Code of Procedure.
5. ALIBI—REASONABLE DOUBT.—In a murder case the defense was an *alibi*, and the defendant's proof was to the effect that, at the time of the homicide, he was with his brother at a ranche several hundred yards distant. Besides charging the reasonable doubt on the entire case and on the general question of the defendant's presence at the place and time of the homicide, the charge applied it specifically to the defendant's proof. *Held*, that this did not restrict the scope of the defense of *alibi*.

APPEAL from the District Court of Nueces. Tried below before the Hon. JOHN C. RUSSELL.

At the September term, 1876, the indictment in this case was returned by the grand jury of San Patricio county, and charged the appellant with the murder of Edward R. Garner, on August 26, 1876, by shooting him with a pistol. At a subsequent term of the District Court of San Patricio county, the venue was changed to the county of Nueces in consequence of the impracticability of obtaining a qualified jury in the former county. At the May term, 1880, of the Nueces District Court, a trial was had, resulting in a verdict convicting the appellant of murder in the first degree, and assessing his punishment at a life-term in the penitentiary.

The homicide was an assassination perpetrated under circumstances denoting more than ordinary depravity. The first witness for the State was Marion Garner, a brother of the deceased. He testified that he and the deceased, accompanied by another brother and a cousin, were in attendance on church services in a school-house at Meansville, a settlement in San Patricio county, after nightfall of August 26, 1876. The house, as appears by a diagram, was an oblong parallelogram, fronting to the east, with a door in that end, and four equidistant windows in the south side. The deceased occupied a seat opposite the third window from the door, and his brother, the witness, one immediately behind him. About eight o'clock, and after services had commenced, the witness noticed the deceased looking intently and anxiously out of the window. Witness could not see out of the window, being in rear of it, and did not know at what the deceased was looking until the latter turned and leaned over the back of the bench on which he was sitting, and in a low tone said to the witness, "Alley Means is outside there, fixing to shoot me; I am afraid he is going to shoot me right here in the church." Witness then tried to look out of the window, but failed to see anyone outside. After making the remark quoted, the deceased immediately rose and walked to the door, and before he could cross the threshold a shot was fired by some one on the outside. The deceased started back, and immediately another shot was fired. Witness saw the flash of the weapon; it was fired from the south side of the door, and was aimed directly into the house. The first shot struck the deceased in the right side, and ranged diagonally towards his heart. The second shot missed the deceased, and, had it not been deflected upwards by striking a bench, it would have gone among the women and children. When the first shot was fired the witness started for the door, but could not reach it on account of the crowd rushing towards it. The deceased ran back from the door to the place he had occupied, fell across the bench and died immediately and without uttering a word. His wife and children were present. Witness did not go out of the house immediately, but remained with the corpse. Quite a number of people were in attendance at the services, and there was much excitement after the shooting. Witness did not see the defendant there that night. A grudge had been cherished by the defendant's family against the Garners, and particularly by the defendant against the deceased. It sprang especially out of the fact that the defendant's father had been killed by a posse led by the sheriff of Bee county and the deceased whilst he was sheriff of San Patricio county, in an attempt made by them to arrest the defendant and his brother under legal process from Bee county. The defendant's father made armed resistance to the arrest, and in the fight which ensued was killed by the posse. The defendant, after he was arrested on that occasion, threatened the deceased, telling him he would have to "suffer for this," and that the affair could not end there. Witness could not say of his own knowledge who fired the shot that killed Edward Garner.

On his cross-examination the witness stated that the defendant and the deceased had met on two or three occasions since the killing of the former's father, and that no difficulty occurred between them on those occasions, but that other persons were present when they had so met. Defendant's counsel asked the witness whether or not the deceased had had a difficulty with one Strickland, in attempting to arrest the latter by chasing and shooting at him? Also, whether or not the deceased had had a difficulty with one Moore, in which Moore was killed by the deceased, and whether Moore had relatives and friends in that section of the country who would probably have sought to avenge his death. Counsel for the State objected to these inquiries as irrelevant and incompetent, and the objection was sustained by the court.

Marcus Peaks, for the State, testified that he and his sister attended the religious services in the school-house at Meansville, the evening the deceased was killed. On their way there, and when they were near the place, the defendant and one Tom Baker rode past them. Baker alighted from his horse and entered the school-house, but the defendant galloped rapidly away towards the house of his brother, N. B. Means. Very soon afterwards, and while the witness was standing at the southeast corner of the school-house, the defendant rode up and hitched or left his horse at the nearest tree to the building, and then, passing the witness, looked in at the first window from the door, and passed on and looked in at another window. Witness went into the house, took a seat, and saw the deceased get up and go to the door, and immediately heard two shots, by one of which the deceased was killed. When witness got an opportunity of looking out at one of the windows, the defendant's horse was gone from the tree where it had been left. The defendant, so far as witness could see, was the only person outside the house when witness entered it. On his cross-examination the witness stated that he saw no weapons on the defendant or Baker.

O. H. Hearne, for the State, testified that he was in the school-house when the deceased was killed. Before that occurrence, witness came out of the house and found the defendant on the outside, and shook hands with him.

Very soon witness went back into the house, and took a seat near to but in rear of the deceased. Observing that the deceased was "fidgety" and was looking intently out of the window, the witness also looked out of a window, and saw the defendant standing about fifteen feet off and looking in the window near which the deceased was sitting. Deceased got up and went to the door, and when he reached it two shots were fired and he turned back. Witness jumped up and ran out of the house, and saw a man run to a horse standing at the tree nearest the house. The man mounted the horse and galloped off, and as he passed into the moonshine, the witness saw and recognized him to be the defendant. At the time the deceased got up and started to the door the defendant's face disappeared from the window. Witness observed no action of the defendant indicating any hostile purpose towards any one.

Two other witnesses testified for the State in partial corroboration of those whose testimony has been already given.

The defense introduced T. B. Means, a brother of the accused. He stated that he lived four or five hundred yards from the school-house where the deceased was killed. About dusk in the evening during which that event occurred, and previous to it, the defendant came to witness' house, and, after turning his horse loose in a lot, went with witness and one Cherry to a Mexican dance or fandango which was going on at some houses about two hundred yards distant. A few moments after they reached there, two shots were fired in the direction of the school-house, and thereupon witness, defendant and Cherry returned to the house of witness, who, hearing the shots, was apprehensive that some trouble had occurred between some of his relatives and the Garners, as there was a feud between the families on account of the killing of witness' father. When the witness got home, accompanied by the defendant and Cherry, the wife of N. B. Means arrived there from church and informed them that one of the Garners had been shot and killed during the services. She said it was Lon Garner who was killed, and witness did not learn that it was Edward Garner until the next day. The defendant remained at the house of witness all that night and until some time during the ensuing day, when he was arrested by an officer for the killing. Cherry had since removed from that section.

The defense proposed to prove by J. G. Brown the facts relative to the difficulty between the deceased and Strickland, as previously inquired after in the cross-examination of the first witness for the State, and also proposed to prove by Brown the character and manner of Strickland. This proof, however, was again excluded by the court, and the defense, as before, reserved exceptions.

Stayton, Lackey & Kleburg, for the appellant.

Thomas Ball, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was indicted for the murder of Edward R. Garner, in San Patricio county, on the 26th day of August, 1876. Two unsuccessful attempts having been made to obtain a jury for the trial of the case in San Patricio county, on application of the district attorney, made in accordance with the provisions of article 579, Code Crim. Proc., the venue was changed to the county of Nueces. By a new provision in our Code of Criminal Procedure, it is declared that "when the venue in a criminal action has been changed, it shall not be necessary to have the witnesses therein again subpœnaed, attached or recognized, but all the witnesses who have been subpœnaed, attached or recognized to appear and testify in the cause, shall be held bound to appear before the court to which the cause has been transferred, in the same manner as if there had been no such transfer." Code Crim. Proc. art. 591.

When the case was called for trial in Nueces county, appellant moved for a continuance on account of the absence of several witnesses who had been duly subpœnaed in San Patricio county, and who had not been so in default that other process might have been invoked prior to or since the change of venue. This motion was overruled by the court. So far as diligence was concerned the application was, perhaps, sufficient under the statute. Doubtless the materiality and admissibility of such testimony as that proposed to be derived from the absent witnesses was the controlling question which determined the action of the court in refusing to grant it. At all events, such considerations must govern us in passing upon the correctness of the ruling. In substance, the facts expected to be established by the absent witness were: That deceased had had serious difficulties with other persons in San Patricio county, and that these other persons were parties likely to take the life of the deceased, should an opportunity for so doing offer. Also that deceased had had a difficulty with one Moore, in which he had killed Moore; that the friends of Moore were much enraged against him, and, living in the adjoining county of Goliad, would, in all probability, avenge the death of their friend and relative; and that the probabilities were that they, or some one of them, and not defendant, were the parties or party who had killed the deceased.

The bill of exceptions shows that on the trial the defendant endeavored to prove the same facts, or facts of a similar nature and character, but all such testimony was, on objection by the state, excluded by the court. If the action of the court was wrong in any one particular pointed out by the exceptions, it was wrong in all; hence all the questions on the subject can be treated as one. The question has been so repeatedly settled and the reasons given by previous decisions of this court, that it is scarcely necessary to do more than refer to some of the cases. See *Boothe* v. *The State*, 4 Texas Ct. App. 217; *Cooper* v.

The State, 7 Texas Ct. App. 200; *Holt* v. *The State*, 9 Texas Ct. App. 571, and the authorities cited in those cases.

The rule is that such evidence affords no reasonable presumption or inference as to the guilt or innocence of the defendant, and it is generally treated as hearsay or *res inter alios acta.* Of course the rule has its exceptions, but they can exist only in cases where the evidence is wholly and strictly circumstantial, and where the mind, having nothing positive or definite to rest upon, seeks light and knowledge from every source, however dim, calculated to throw light upon the transaction.

Here we have a different case — a case by no means dependent upon circumstantial evidence alone. We have the defendant with a motive to commit the deed,—the fact that deceased had participated in the killing of his father, and his threatening to kill the deceased to avenge his father's death. And in addition to these motives and threats, the defendant is shown by the positive testimony of many witnesses to have been bodily present at the time and place where the homicide took place; while there is not the slightest evidence that any of his other enemies were there. More than that, we have the declaration of deceased to his brother just before the killing: "Alley Means is outside there, fixing to shoot me; I am afraid he is going to shoot me right here in the church." Immediately the deceased goes to the door, where the fatal shots are fired. No one sees the party who does the shooting, it is true, but defendant and his horse, which had been tied or was standing a few feet off, both disappear and are seen no more about the premises after the shooting. Under such circumstances, would not the mind of any sensible, rational being naturally conclude that defendant, and he alone of all the enemies of the deceased, was the party who did commit the deed, if from no other reason from the sole one that he was the only enemy who had the then present opportunity to commit, and was the only one in immediate juxtaposition to, the crime? We think so. The case is not one purely of circumstantial evidence, and the court did not err in refusing to permit the testimony offered of the hostility of other parties.

So far as the declarations of the deceased to his brother, to the effect that "Alley Means is outside there, fixing to shoot me; I am afraid he is going to shoot me right here in church," are concerned, and which were objected to by defendant at the time, they were clearly *res gestæ*, and admissible as original evidence. *Cox et als.* v. *The State*, 8 Texas Ct. App. 256.

We propose to notice objections to only two of the paragraphs of the charge of the court to the jury. In the seventh paragraph the jury were told, "you are the exclusive judges of the facts of this case, and of the credibility of the witnesses who have testified before you. If there are conflicts in the evidence, it will be your duty to reconcile them if you can. If you cannot, it will then be your duty to give credit to the statements of the witnesses that you may believe most entitled to belief." A similar charge was passed upon by us in the case of James Williams from Nueces county, decided at the present term *(ante*, p. 8), and it was there held that, whilst a court might well pretermit such efforts to aid a jury, since there was no occasion for such aid, as to the manner in which they should pass upon the evidence, still the charge was not obnoxious to the statutory inhibitions, and could not in any perceivable manner have operated materially to the prejudice of the rights of the defendant.

The defense was an *alibi*. On this defense the jury were instructed, "If from the evidence the jury entertain a reasonable doubt of the presence of the defendant at the place Edward R. Garner was killed, at the time of the killing (if he was killed), and if they entertain a reasonable doubt that at that time he may not have been elsewhere, and at a distance of seven or eight hundred yards distant, at a ranche with his brother, the defendant is entitled to the benefit of that doubt, and the jury should acquit him."

We do not think that this paragraph is misleading, as is contended by appellant's counsel, or that it restricts the defense of the *alibi* to a particular place at the time of the homicide. Defendant's theory and his evidence were to the effect that, at the time of the homicide, he was in fact with his brother, attending a fandango some several hundred yards off at a ranche. We cannot see how he can complain that in addition to the charge of the reasonable doubt generally, as to his presence at the time and place of the homicide, the court should also, as was done, charge it with regard to his presence also at the identical place he claimed to have been when the deed was committed. The charge was a fair and full presentation of the law applicable to the facts.

A mature consideration of the facts has left no doubt upon our minds of defendant's guilt as ascertained and declared by the jury. His crime cannot be characterized as anything less than a cold-blooded, deliberate assassination, committed in the very sanctuary of the Most High, and in the midst of the congregation and services of his people.

The judgment is in all things affirmed.

Affirmed.

DICK EDWARDS v. THE STATE.

1. ADULTERY, as defined by the Penal Code, art. 333, is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person.
2. SAME.—The other essentials being present, the crime of adultery depends upon either of two circumstances: (1) The living together and carnal intercourse with each other, or (2) habitual carnal intercourse without the living together.

3. SAME — INDICTMENT which merely charges that the parties "did then and there unlawfully cohabit together and carnally know each other," is insufficient to charge adultery. See the opinion for charging clause set out and *held* bad.
4. SAME — AMENDMENT.— When, as in this case, the defect in the indictment is matter of substance, the indictment is not amendable, and the prosecution will be dismissed.

APPEAL from the District Court of Brazoria. Tried below before the Hon. W. H. BURKHART.

The opinion discloses the case.

Masterson & Masterson, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant and one Mary Ann Griffin, *alias* Mary Ann Shepperd, were indicted, tried and convicted on an indictment which charges, with proper averments as to time and venue, as follows: "did then and there unlawfully cohabit together and carnally know each other, the said Dick Edwards then and there not being the husband of said Mary Ann Shepperd, and the said Mary Ann Shepperd not being then and there the wife of the said Dick Edwards, being then and there a married man and having a living wife, from whom he had not been divorced, and who he well knew was then and there living." The sufficiency of the indictment is called in question by motion in arrest of judgment.

The offense with which these parties appear to be charged is that of adultery, which is thus defined by law: "Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to another person." Penal Code, art. 333. The other essentials being present, the crime may consist of either one of two circumstances: 1st, living together and carnal intercourse with each other, and 2d, by habitual intercourse with each other without living together. The indictment does not charge either that these parties did live together and have carnal intercourse with each other, or that they had habitual intercourse without living together, but that they did then and there unlawfully cohabit together and carnally know each other. We cannot say that the words employed in the indictment are equivalent to, or synonymous with, the language employed in either of the definitions of the offense as the same is set out in the article of the Code cited above; nor is it in the language of the Code. The indictment being defective and insufficient in a matter of substance, is not amendable; and as it is not sufficient to support the verdict and judgment of conviction, the judgment must be reversed and this prosecution will be dismissed.

Inasmuch as the prosecution will be dismissed because of a defective indictment, it is not necessary to revise other rulings of the court below, notwithstanding we are of opinion the court erred to the prejudice of the defendants in admitting evidence over objections set out in the defendants' bill of exceptions.

Reversed and dismissed.

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CHARLES ROTH *v.* THE STATE.

1. THEFT — VENUE.— Theft may be prosecuted either in the county where the property was taken or in any other county through or into which it was carried by the thief.
2. SAME — GRADE OF OFFENSE.— If the prosecution be in a county other than that in which the theft was committed, and the evidence shows that the value of the stolen property was enough to make the offense a felony, but that the value of the portion carried into the county of the former was not enough to make the offense a felony, the conviction can be for misdemeanor only.

3. **EVIDENCE — PRACTICE.— If testimony be objectionable as hearsay or because it presupposes the existence of better evidence, its competency must be challenged in the trial court, and cannot be primarily assailed on appeal.**
4. **INDICTMENT — THEFT of a bank-note is sufficiently charged if the indictment charges theft of a " bank-bill,"— the latter being the statutory term in this State.**
5. **VARIANCE — IDEM SONANS.— Indictment charged theft of a note on the "Chatam National Bank;" but the note as proved and exhibited was on the Chat*h*am National Bank. *Held idem sonans,* and not a material variance between the alleged and the proved appellation of the bank.**

APPEAL from the District Court of Comal. Tried below before the Hon. G. H. NOONAN.

The case is disclosed in the opinion.

J. D. Guinn, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was indicted for the theft of "two United States National ten dollar currency bills, of the value, then and there, separately, of ten dollars, and of the aggregate value, then and there, of twenty dollars; one of said bills is described more particularly as follows, to wit: No. 1375, from the Chatam National Bank of New York; the exact description of the other bill is to these grand jurors unknown," etc.

The evidence established that the theft was committed in the county of Guadalupe; the prosecution was in the county of Comal. It is provided by statute that, "where property is stolen in one county and carried off by the offender to another, he may be prosecuted in either the county where he took the property or in any other county through or into which he may have carried the same." Code Crim. Proc. art. 216; *Cox* v. *The State,* 43 Texas, 101; *Connell* v. *The State,* 2 Texas Ct. App. 422; 1 Bish.

Crim. Proc. (3d ed.) sec. 59. But it seems that where a party is prosecuted in a county other than that in which the theft was committed, a complete offense must be shown in the county where the conviction was had. If defendant stole twenty dollars in Guadalupe county, but the proof showed him in possession of only ten dollars in Comal, whilst he might be convicted of a felony in Guadalupe, if there tried, he could, under such proof, be only convicted of a misdemeanor in Comal,—the amount found to have been in his possession in Comal being less than the sum ($20) necessary to constitute felony under the statute. So the learned judge properly charged in this instance that the jury might find, if the evidence warranted, that the defendant could only be punished for a misdemeanor if he was found to have been only in possession of ten dollars of the stolen money in Comal, though the evidence might further show that he had in fact stolen twenty dollars in Guadalupe at the time he took the ten.

The proof, however, established the fact that defendant not only took but asported the twenty dollars to Comal county; for the sheriff found ten dollars of the money,—a bill which had been fully described and was identified by the owner,—and obtained it from the saloon keeper to whom defendant had passed it; and he also testified that the owner told him that he, the owner, had ascertained that defendant had passed another ten-dollar bill, at Lippell's store, in New Braunfels. This latter portion of the evidence might have been inadmissible as hearsay, and as presupposing in itself the existence of better testimony, but it was not objected to by defendant, and he cannot be heard to complain.

It is objected that in two respects there is a fatal variance between the note found, identified, and offered in evidence, and the description of it as contained in and set out in the indictment;—1, because the indictment charges the theft of National *bank bills*, whilst paper introduced in evidence was a National *bank note*. In our Code "the term *property*, as used in relation to the crime of theft, includes money, *bank bills*," etc. Penal Code, art. 732. "Bank bills" is the statutory term. Mr. Bishop says: "If the indictment designates the thing stolen by its name, the statutory term should be employed. Yet a word of the same or a more definite meaning may suffice; as 'bank bill' for the statutory 'bank note.'" 2 Bish. Crim. Proc. (3d ed.) sec. 731; 1 Whart. Crim. L. (7th ed.) sec. 346.

2. It is contended that there is a fatal variance because the bill is described as one issued by the "Chatam National Bank," whilst the one offered in evidence purports to have been issued by the Chatham National Bank,—the difference being in the omission by the pleader of the second "*h*" in spelling the word "Chatham." We do not think the objection maintainable. The rule adopted generally seems to be, according to the distinction stated by Lord Mansfield, "that, where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material." 1 Whart. Crim. L. (7th ed.) 309; 1 Bish. Crim. Proc. (3d ed.) 562. Here the word is not changed and is strictly *idem sonans*. We are aware that in some courts a distinction is sought to be drawn between omissions or changes in the spelling of ordinary words and that of proper names (66 Ill. 344); but there can be no reason for the rule where the variance is so slight, and does not affect the word or name more than in the case before us.

There is nothing further in the record to be discussed. Failing to perceive that any substantial error has been committed, the judgment is affirmed.

Affirmed.

ED. DAVIS *v.* THE STATE.

1. **CHARGE OF THE COURT.**—If, after having charged the general principles of law and the statutory definitions of the offense, the court makes a direct application of the law to the evidence in the case, the charge is not amenable to the objection that it states merely abstract propositions of law.
2. **SAME.**—The charge of the court must give to the jury instructions applicable to every legitimate conclusion which can be deduced from the evidence, and if there be conflicting theories of the State and defendant, supported by any evidence, they must be presented clearly and pertinently by the charge. See the opinion for a charge *held* correct and sufficient under the evidence in this case.
3. **SAME—NEW TRIAL.**—If of the two theories presented by the evidence and submitted by the charge, the evidence tends to support that of the State, but fails to establish it with reasonable certainty, and the court refuses thereupon to grant a new trial, the error is not in the charge but in the ruling on the motion for new trial.

APPEAL from the District Court of Milam. Tried below before the Hon. SPENCER FORD.

The indictment charged the appellant with an assault with intent to kill and murder one Julius Johnson, in Milam county, April 9, 1880. A verdict of guilty was returned against him by the jury, and his punishment was fixed at two years in the penitentiary.

The evidence in chief for the State established substantially that the prosecuting witness, Johnson, was at work in a field rented by him in Milam county, on the day alleged in the indictment, when the defendant, armed with a gun, and accompanied by one Luther Parker, came to the field. The appellant asked Johnson why he was keeping or harboring his dog? to which Johnson replied that he was not so doing. Appellant then said that Johnson's wife was feeding the dog, and keeping him at their house. The witness Johnson denied this charge, and told appellant if he wanted his dog to go and get him; that if he, witness, had a dog that would not stay at home he would kill him and make him stay there. Appellant then said "God d—n you," and started towards witness, threatening to slap his jaws. The witness then told appellant that if he thought he could slap his jaws, to try it. Appellant then said to witness that if he meant business to say so, and witness turned, ran to his house, got his gun and returned. As he approached, appellant fired, the shot taking effect in the side of witness' neck. Appellant then broke his gun over witness' head; whereupon witness shot appellant in the leg, and he, appellant, started to run. On cross-examination this witness, Johnson, stated that he cut appellant with a knife after he had shot him in the leg. Re-examined, he testified that he made no attempt to shoot appellant until after he was shot himself, and that he went to the house to get his gun for self-defense.

The material difference between the testimony of the witness Johnson for the State, and that of Luke Parker and Catherine White (who were near by when the altercation commenced and saw it all) for the defense, is that the two last named witnesses make Johnson the aggressor except in the verbal dispute about the dog. Their testimony is very similar, and to the effect that, after appellant spoke of slapping Johnson's face, Johnson said that he "would walk through appellant if he (appellant) were only large enough." Appellant then said to Johnson that if he, Johnson, "meant business to say so;" whereupon Johnson turned and went to his house, some 200 or 300 yards distant. During this absence, the witness Parker, according to this evidence, importuned appellant to run and get away from the place. Appellant stayed until Johnson was seen returning with a gun and pistol, and then started to run. Johnson, running also, overtook appellant some 200 or 300 yards from where the latter started, and as he approached presented his pistol towards appellant and snapped it at him two or three times, when appellant turned and fired upon Johnson and then struck him over the head with his gun and fled again, but was shot down by Johnson, and stabbed in the arm and back. The witnesses, Parker and Catherine White, claimed also that on the examining trial they stated that, when Johnson started back with his gun and pistol, appellant started to run, but was pursued and overtaken by Johnson. They testified positively that they gave such evidence before the examining trial, but this part of their evidence was contradicted by witnesses for the State in rebuttal. The magistrate before whom the examining trial was had testified to the contrary, and the written evidence of these witnesses, taken down on that occasion, was introduced by the State, and failed to sustain their testimony in that respect.

Hamman & Adams, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was indicted for an assault with intent to murder one Julius Johnson. At the fall term, 1880, the cause came on for trial, resulting in a verdict and judgment of conviction, and penalty assessed at two years' confinement in the penitentiary. Motion for a new trial was overruled, and defendant appeals to this court. In his charge the judge defined murder, malice, and assault and battery, and as a test of the character of the assault, gave this in charge to the jury: "Whenever an assault is committed under such circumstances that, had death resulted therefrom, the offense would have been murder, such an assault is an assault with intent to murder." The counsel for defense does not object to these charges upon the ground that the definitions are incorrect, nor that an erroneous principle is enunciated, but solely for the reason that they state abstract propositions of law, general in their nature, and calculated to confuse and mislead the jury to the prejudice of the defendant, — citing in support of this objection, *Miles* v. *The State*, 1 Texas Ct. App. 510, and *Francis* v. *The State*, 7 Texas Ct. App. 515.

By an examination of these cases, and other authorities on this subject, it will be found that the error does not consist in the enunciation of general principles of law defining the offense charged, but in the failure to make a direct and pertinent application of the law to the case as made by the facts. If the charge dealt in general principles of law and statutory definitions alone, the objection would be well taken; but after having given these principles and definitions, the judge made a direct application of the law to the evidence in the case. To the following portion of the charge, thus applying the law to the facts, the counsel for defendant objects: "If the defendant went to the field of Johnson with the intent to shoot and kill Johnson, and did shoot him with intent to kill him, he is guilty of an assault to murder." "Or, if he went where Johnson was and they then got into a quarrel, and both Johnson and defendant formed an intent each to take the life of the other, and with this intent defendant willingly entered into the fight and shot Johnson, he is guilty of an assault with intent to murder."

The objection urged is not to the principle contained in the charge, but that there is no evidence to support it. The rule is this: "It is the duty of the judge presiding to give instructions applicable to every legitimate conclusion which can be made from the evidence." The theory of the State and that of defendant, if supported by any evidence, should be presented in a charge by which these theories are clearly and pertinently made prominent to the jury. If there be evidence tending to establish these theories, it is the duty of the judge to charge thereon;

and if the jury should convict, the error would not be in the charge. But suppose the evidence tends to support the theory of the State, but fails to establish it with reasonable certainty, the error would not be in the charge, but in the ruling of the court upon the motion for a new trial. The legal principles set forth in this charge are not questioned; the objection being a want of a predicate in the facts upon which to base the charge. We are of the opinion that the evidence lays a foundation for, and clearly indicates the necessity of, such a charge. We are also of the opinion that the evidence not only tends to support the theory of the State, but establishes it with reasonable certainty, to that degree of satisfaction which clearly justified the court below in overruling the motion for a new trial.

For the same reason the counsel for defendant objected to this charge: "If the defendant provoked the difficulty with Johnson, with the intent to kill him, and retreated, not for the purpose of withdrawing from the fight, but with a view of drawing on Johnson and then to shoot him, and if he did shoot Johnson with intent to kill him, he is, in that case, guilty of an assault to murder."

To this we apply the observations made in regard to the first. It will be seen that these charges apply to the theory of the State; by reference to the whole charge, it will be found that the judge gave clear and pertinent charges to every phase and theory of the defense, presenting the vital issues clearly to the jury. The charge being a proper application of the law to the facts, the jury having passed upon these, we cannot say that the verdict is not sustained by the evidence; the judgment must, therefore, be affirmed.

Affirmed.

FELIPE GRETA *v.* THE STATE.

EVIDENCE.—A husband being prosecuted for an assault with intent to murder his wife, and the evidence of the wife tending to show that his anger was aroused by the presence with her of an unknown man two days before the alleged assault, the defense offered to prove that some twenty days previous she had been surprised in an act of criminal intimacy with the unknown man, and that defendant was apprised of that fact. *Held*, that under the peculiar facts of this case, the exclusion of the proffered testimony was error. But it was not error to exclude proof of her general reputation for lewdness.

APPEAL from the District Court of Bee. Tried below before the Hon. H. C. PLEASANTS.

This is a branch of the case of *Greta* v. *The State*, 9 Texas Ct. App. 429, where a full account of the facts is reported. That case was for the murder of Julian Andreda, the step-father of Pabla, the appellant's wife. The indictment in the present case charged the appellant with an assault upon Pabla, with intent to murder her. Both cases arose out of the same transaction, and it occurred in Live Oak county, but the venue in the present case was changed to the county of Bee. In the opinion now reported will be found the evidence involved in the rulings. The conviction was for aggravated assault, and a fine of $25, the punishment assessed.

Lane & Payne, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was charged with an assault with intent to murder his wife, Pabla Greta, and was found guilty of an aggravated assault; from which judgment of conviction he appeals to this court. The main witness for the prosecution was his wife, who testified in substance, as follows: "I am the wife of defendant; on Friday, the 8th day of August, 1879, my husband was going to Lagarto to get some corn ground, and wanted me to go with him to my mother's; I did not want to go, as I had seen my mother a short time before, but he said yes, I must go. My mother and her husband arrived at our house and I went with them home, and soon after we got to my father's house, defendant came; while at supper my baby cried, and ma told my sister to take care of it, and a man I did not know took the baby. Felipe, defendant, asked me afterwards who that man was, and I told him I did not know; he was mad about it; when he started for Lagarto, he wanted me to swear before my God, that I would not stir away from there until he came back.

"Defendant and his brother came back on Sunday; Julian (witness' step-father) shook hands with them and told my mother to go and make coffee. They all came into the house; Julian sat on the bed, and Felipe, defendant, sat on a chair on one side, and his brother took a chair on the other side, in reach of that gun. Defendant asked me for the baby, and sat and petted it for awhile, then gave it back to me; then defendant and his brother looked at each other in a way I did not understand, and I got up and went and sat on the lounge. Then defendant and his brother changed chairs, and defendant said to my father, 'will you please give me my baby?' and he said, 'yes, it is your baby and you can take it where you like;' then defendant jumped up and caught hold of the baby (which I held in my arms) with one hand, and drew his six-shooter on me with the other. Then my father sprang and caught hold of the six-shooter, and Victoriano (defendant's brother) said, 'Oh no, don't you shoot sister.' When father caught the pistol, defendant shot him through the hand; when the defendant drew the pistol on me, I let the baby go; defendant, when he shot father through the hand, then shot him through the breast; Victoriano seized the gun and shot him too; defendant called to his brother to kill them all; after the shooting defendant and his brother rode away; defendant carried the child away; the child was about nine months old.' "

Cross: "When the defendant drew his six-shooter on me, he could have shot me if he had so minded; I dropped my hold on the child when the pistol was drawn on me."

The witness refused to answer the following question: "When the defendant drew his six-shooter on you, did you jump back?"

The conduct of defendant, viewed through the light of the evidence of his wife alone, is very strange indeed. A faint gleam of light is shed upon this transaction by that part of the evidence by which we are informed that defendant asked his wife who the man was that took the child; she answering that she did not know, and that the defendant was mad, etc.

To explain this apparently mysterious, wanton and malicious conduct of the defendant, he proposed to prove that, about twenty days before the date of the assault, the witness, his wife, was surprised in undue intimacy amounting to infidelity with the unknown man, and that this infidelity was communicated to defendant prior to the alleged assault. To this the State objected, and the court sustained the objection, to which ruling of the court the defendant excepted, and reserved the point by bill. We are of the opinion that these facts were of a very important character, and that the jury should have been informed of them in order to a proper understanding of the conduct and bearing of defendant.

The evidence of the witness, environed with these facts, may have reasonably and justly been viewed in quite a different light from that in which it was seen and held without them. We are therefore of the opinion that the court below erred in sustaining the objection of the State to the introduction of this evidence. The defendant proposed to prove the unchastity of this witness, his wife, by evidence of general reputation. The court refused to permit this; and in this we think there was no error.

The question raised as to the action of the court in overruling the defendant's challenge for cause to certain jurors will not likely arise upon another trial, and will not, therefore, be passed upon.

For the errors above designated, the judgment is reversed and the cause remanded.

Reversed and remanded.

FREDERICK MEIER *v.* THE STATE.

1. COMPLAINT AND INFORMATION — VARIANCE.— Where, as in this case, there are expressions in the complaint not used in the information, but which, if treated as surplusage and stricken out, would leave the complaint complete, the variance is not fatal.
2. AGGRAVATED ASSAULT — INDICTMENT.— While an information or indictment for aggravated assault must charge the particular circumstance of aggravation relied upon, it need not charge the offense in so many words to be an "*aggravated assault.*" See the opinion for an information for this offense *held* sufficient.

APPEAL from the County Court of Austin. Tried below before the Hon. J. P. BELL, County Judge.

The information charged an aggravated assault and battery upon Albert Solomon, with slung shots, in Austin county, on the 18th day of January, 1880. The punishment imposed by the jury, in a verdict of guilty of aggravated assault, was a fine of $150. No statement of facts comes up with the record.

Chesley & Haggerty, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. The information upon which the appellant was tried in the court below, following substantially the complaint upon which it is based, charges that the appellant and another (as follows), "on the 18th day of January, A. D. 1880, with force and arms, in the county of Austin, did then and there make an assault and battery in and upon one Albert Solomon, by then and there striking him, the said Albert Solomon, with a slung shot, and inflicting serious bodily injury upon him, the said Albert Solomon, contrary," etc. The sufficiency of the information is called in question by motion in arrest of judgment, setting up, 1st, a variance between the information and the complaint, and 2d, because the information is insufficient to charge either an aggravated assault and battery or a simple assault and battery.

With reference to the first ground of the motion in arrest of judgment, it is perhaps sufficient to say that the only variance apparent is that in the complaint it is stated that the defendant did commit the offense of aggravated assault upon the body of Albert Solomon at Cat Spring, Austin county, by calling him out of a certain bar-room and "striking him on his head with slung shots about six or seven times, thereby inflicting great bodily injury upon him, the said Albert Solomon; whilst the offense as charged in the information is as set out above. We see no such variance between the complaint and the information as would warrant a reversal of the judgment. There are some expressions employed in the complaint not used in the information, but these may be disregarded as surplusage, and if stricken out would leave the complaint complete. The information follows substantially the complaint in so far as the charging part is concerned.

With reference to the second ground of the motion, when considered with reference to authorities cited in the brief of appellant, the only apparent objection seems to be that the information does not in so many words charge the commission of an aggravated assault and battery. It was said in *The State* v. *Pierce*, 26 Texas, 114, that it seems to have been the intention of the Code to treat simple assaults and aggravated assaults as distinct offenses, and it would be well for the courts to so treat them. This remark we must regard in the light of a suggestion. It will be seen that the question was raised on an appeal by the district attorney from the ruling of the court below on an indictment for an assault and battery "with a knife, said knife being a deadly weapon and calculated to inflict great bodily injury." The court further said that a party ought not to be punished for an aggravated assault upon an indictment which does not charge an aggravated assault in terms. The cases of *Browning* v. *The State*, 2 Texas Ct. App. 47, and that of *Williamson* v. *The State*, 5 Texas Ct. App. 485, are also cited by counsel in support of the motion.

We submit that by a fair interpretation of these cases, all and each of them, it will be found that all said in either on the subject of charging an aggravated assault in terms does not necessarily mean that the term *aggravated assault* must be specifically employed. Take, for instance, the case in 5 Texas Ct. App.; there there were two grounds relied on for a reversal of the judgment, and the second was that the information did not charge an aggravated assault. The court, quoting from *Browning* v. *The State*, says it is a familiar rule of criminal practice that "when a peculiar or aggravated punishment is to be inflicted, the peculiar or aggravated matter constituting the offense is required to be set out in the indictment." The court then proceeds as follows: "There are nine separate, distinct and specific grounds enumerated in the statute, any one of which would make the offense an aggravated assault and battery, and some one of which must be alleged, to render an indictment or information good and valid as a charge for that offense." An extract, it is true, is taken from the case in 26 Texas, to illustrate the argument. But neither in *Williamson* v. *The State*, nor in *Browning* v. *The State*, is it expressly decided that the terms *aggravated assault* are indispensable in charging the offense of aggravated assault, and in *Pierce's* case the conclusion of the opinion indicates that such a ruling was not necessary to a decision of that case.

These cases, on the contrary, hold what we think to be the true doctrine, and one applicable as well to our present Code as to the one in force when these cases were decided; that is, that an assault must be charged in express terms in either case, but if it is intended to prosecute for an aggravated assault, the circumstances of aggravation must also be set out; which, we think, is the proper application of the terms made use of in *The State* v. *Pierce*, to the effect that a party ought not to be punished for an aggravated assault upon an indictment which does not charge an aggravated assault in terms. To charge specifically the circumstances of aggravation would charge it in terms even more pointedly, and would much more clearly apprise the defendant as to what he had to defend against, than by simply employing the language that he did commit an *aggravated assault*, without setting out the circumstances which constitute the aggravation intended to be proved. By giving this meaning to the language employed in each of these cases, and which seems to be fair and legitimate, these cases harmonize with other authorities, and sustain rather than militate against the views we entertain of the question under consideration; which are, that in an indictment or information for an aggravated assault it is not necessary or requisite under the law to characterize the offense in so many words as an "*aggravated assault*," but, in order that the accused may be apprised of what he will have to meet on the trial, it is necessary and requisite to charge the circumstances of aggravation in order to support a conviction for an aggravated assault or an aggravated assault and battery.

There need be no doubt or confusion or want of uniformity in the practice. The Code defines assault and assaults and batteries in plain terms. It also declares the circumstances under which an assault or an assault and battery becomes aggravated. It does not define an aggravated assault or an aggravated assault and battery, but does declare the circumstances which would render an assault or assault and battery aggravated, and thereby indicates, we are of opinion, very clearly the course to be pursued by the criminal pleader in preparing an indictment or information for an aggravated assault or aggravated assault and battery — that is, to charge first the assault with all the necessary particularity as to time, place and circumstances, and add thereto, not in a second count necessarily, but in the same count, the particular circumstance of aggravation which is intended to be relied on for a conviction for the higher grade of offense; that is, some *one* of the circumstances under which an assault or battery becomes aggravated, as they are enumerated in subdivisions 1 to 10, inclusive, in article 496 of the Penal Code.

The information in the present case comes fully up to all the requirements of the rules as above stated. It charges an assault, and states the time when and the place where it was committed, and the name of the person upon whom it was made. It does not state that it was committed with a deadly weapon, but it does charge that by the use of the means employed serious bodily injury was inflicted; which brings the offense committed within subdivision 7 of article 496 of the Penal Code. We are of opinion the information is sufficient to support a conviction for an aggravated assault and battery, and that the court below did not err in overruling the motion in arrest of judgment.

There being no other error complained of, or which we can properly consider in the absence of a statement of facts, the judgment is affirmed.

Affirmed.

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ESMERIJILDO ARMENDARES *v.* THE STATE.

1. JURY LAW.— Only such persons as under our Constitution and laws are qualified voters in the State and county are competent to serve on juries in this State.
2. SAME — NEW TRIAL.— Several jurors having answered on *voir dire* that they were citizens of this State, they were accepted and impaneled. After trial and conviction it was discovered that they were in fact citizens of Mexico, whereupon the accused moved for a new trial, and set up their non-qualification as cause. *Held*, that the court erred in refusing to grant a new trial.
3. SAME — PRACTICE.— Proposed jurors having qualified themselves on *voir dire*, the accused is not required to presume them guilty of perjury, and extend his investigation. See the opinion for state of facts which will avoid the stringent application of the rule laid down in *Roseborough* v. *The State*, 43 Texas, 570; *O'Meally* v. *The State*, 1 Texas Ct. App. 180, and *Lester* v. *The State*, 2 Texas Ct. App. 423.
4. CHARGE OF THE COURT.— Note suggestions to trial judges of the danger of invading the powers of the jury by transcending in their charges the language of the Code respecting the relations of the jury to the evidence adduced.

APPEAL from the District Court of Webb. Tried below before the Hon. J. C. RUSSELL.

No brief for the appellant.

Thos. Ball, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of the theft of cattle, and his punishment fixed at two years' confinement in the penitentiary. From this judgment he appeals to this court.

By the record we learn that four of the jurors who tried the case, when tested as to their qualifications, swore that they were qualified voters in the county and State, under the laws and Constitution of the State, when, in fact, they were citizens of Mexico. This fact was ascertained after the trial and conviction, and was urged by appellant for a new trial, in his motion for the same.

In the bill of exceptions to the action of the court overruling the motion for a new trial, it is conceded that the jurors were, at the time, citizens of Mexico, and not legal voters in the county of Webb. It is also conceded that appellant learned this first, after the trial. The question for our decision is, "did the court err in overruling appellant's motion for a new trial?" We think so. These jurors were not qualified to serve in any case, and as they swore to their qualifications, the appellant was not required to believe them guilty of perjury, and extend the investigation further. These circumstances might well relieve this case from the stringency of the rule enunciated in *Roseborough* v. *The State,* 43 Texas, 570; *O'Meally* v. *The State,* 1 Texas Ct. App. 180, and *Lester* v. *The State,* 2 Texas Ct. App. 423, where it was held that the defendant could not avail himself of the objection unless he further showed that the matter was one which he could not have obviated by a further inquiry and proper diligence. Learning of their disqualification after the trial, he, upon that ground, moved the court to grant him a new trial. This we think should have been done. *Hanks* v. *The State,* 21 Texas, 526; 41 Texas, 573.

The court below charged the jury as follows:

"The jury are the exclusive judges of the facts of the case, of the credibility of the witnesses, and the weight to be given to their testimony. If there are conflicts in the evidence, you will reconcile them if you can, and if you cannot reconcile them, then it will be your duty to give credit to the witnesses that you may believe most entitled to credit and belief."

Art. 728, Code Crim. Proc., provides that the jury, in all cases, are the exclusive judges of the facts *proved,* and of the weight to be given to the testimony. It is proper to give this in charge, but very dangerous to go beyond this. We suggest that if the court below would simply use the language of, or that of similar import to, the statute, the object would be attained, with perfect safety from the danger of impugning the power of the jury. As the judgment must be reversed upon the ground that the jurors above alluded to were not qualified, we will not pass upon that portion of the charge referred to, further than the observations already made.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

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R. E. STAFFORD AND ANOTHER *v.* THE STATE.

BAIL BOND.—One W., who was confined in the G. county jail, under a *mittimus* from the District Court of C. county, was allowed bail and gave the required bond with sureties approved by the sheriff of G. county, who accepted the bond and sent it to the clerk of said court, as directed by the order allowing the bail. Meanwhile the said sheriff had received a *capias* from the District Court of B. county for the arrest of W. to answer a different charge there pending, and without setting W. at large, arrested and detained him by virtue of the *capias* until the sheriff of B. county conveyed him to the jail of that county, and he subsequently escaped therefrom. At the next term of the District Court of L. county, to which the venue had been changed, W. failed to appear, and judgment *nisi* was entered against him and his sureties on the bond; and in defense to the *scire facias*, the sureties pleaded that the bond had never become operative or binding, because their principal had not been set at liberty or placed in their custody, but was continuously detained by the State until he made his escape. But *held*, that the plea sets up no defense. Inasmuch as the bail bond took effect from its delivery and acceptance, and W. was not thereafter detained by virtue of the *mittimus* from C. county, but by virtue of the *capias* from B. county, and inasmuch as he was not in custody at all when he forfeited his bond, his arrest and detention by virtue of the *capias* had no effect on the validity of the bond or the liability of the sureties. The case would be different if, notwithstanding the

allowance of bail and acceptance of the bond, W. had been held in custody under the *mittimus* from C. county, or if, at the time the bond was forfeited, the State prevented his appearance by detaining him on any charge, or if the sureties had surrendered him, as they could have done notwithstanding his detention on the *capias*.

ERROR from the District Court of Liberty. Tried below before the Hon. EDWIN HOBBY.

A clear statement of all the material facts of this important, interesting and well-contested case will be found in the opinion of the court. The case of which the present is an offshoot had its origin in the assassination of Green Butler, in Galveston county, May 19, 1872. Andrew J. Walker, Amos Walker and Jeff. Black were jointly indicted for the murder, and, Amos Walker effecting his escape, the others were twice jointly tried and convicted in Galveston county; but, on their appeals to the Supreme Court, the convictions were set aside and new trials awarded. See 37 Texas, 366, and 42 Texas, 360. A change of venue was then had from Galveston to Chambers county, and there, in 1875, a severance was had, and Black was convicted. On his appeal to this court that conviction was set aside for reasons disclosed in 1 Texas Ct. App. 368. In 1878, Walker and Black applied to the Hon. H. C. Pedigo, district judge, for the privilege of bail, and from his order overruling their application they appealed to this court, and by its order Walker was admitted to bail in the sum of $15,000, and Black in the sum of $10,000. 3 Texas Ct. App. 668. R. E. Stafford and S. E. Allen, the plaintiffs in error in the present case, became sureties on the bond of Walker. By another change of venue, the case against Walker for the murder of Butler was removed from Chambers to Liberty county, and was pending in the latter county when Walker's bail bond was adjudged forfeited, and the proceedings ensued which resulted in the present appeal. Those proceedings are clearly disclosed in the opinion, and are therefore unnecessary here.

A motion for rehearing was pressed with great force, but was overruled.

Willie & Cleveland, for the plaintiffs in error. When a bail bond is accepted and approved by the proper officer of the State, if the principal therein is not enlarged and set at liberty in pursuance of the bond, but is held in confinement in jail by such officer; or if, having been set at liberty in pursuance of such bail bond, whereby he is put into the custody of his sureties, they are thereafter deprived of the custody of the principal by the State acting through its proper officer, and by its authority the principal is arrested and held in jail, and he escapes therefrom, the bond, in either case, imposed no obligation on the makers, and is not subject to forfeiture for non-appearance of the principal. Rev. Code Crim. Proc. art. 313; 1 Chitty Crim. Law, 92; 2 Hawkins' P. C. ch. 15, sec. 2 *et seq.;* 1 Bacon's Ab. 597; Com. Dig. title "Condition," 4–6; 3 Blackstone, 224, note; *Cooper* v. *The State*, 5 Texas Ct. App. 215; *Peacock* v. *The State*, 44 Texas, 11; *State* v. *Allen*, 2 Humph. 258; *People* v. *Stager*, 10 Wend. 437; *Commonwealth* v. *Bronson*, 14 B. Monroe, 363; 11 Bush, 606; *Commonwealth* v. *Coleman*, 2 Metcalf (Ky.); *People* v. *Bartlett*, 3 Hill, 571; *Canby* v. *Griffin*, 3 Harr. 333; and Mahon's case, 569; *People* v. *Manning*, 8 Cowen, 297.

Upon the case thus stated, what is the law? And at the threshold of this question we are confronted with another, upon the correct solution of which will depend the answer to the one first stated, What is bail? In the language of Chitty (1 Crim. Law, edition of 1836, p. 92), "bail is a delivery or bailment of a person to his sureties upon their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody, instead of going to prison."

Mr. Bishop, in his work on Criminal Procedure, sec. 248, gives this definition: "The verb *to bail*, when applied to persons, is the delivery in legal form of one under arrest to another or others, who thereby become entitled to his custody, and, with him, responsible for his appearance in fulfillment of the purpose of the arrest. *The noun bail* may denote either the process of bailing, or the one or more persons who are thus made the custodians and sureties."

Mr. Webster, in his Unabridged Dictionary, defines the *verb* to bail thus: "To set free, deliver or liberate from arrest and imprisonment, upon security given that the person bailed shall appear and answer in court." The *noun* bail, thus: "The person or persons who procure the release of a prisoner from custody by becoming surety for his appearance in court." "The security given for the release of a prisoner from custody; as the man is out upon bail."

From these elementary definitions it results that when a bail bond is accepted and approved by the proper officer of the State, it is *in fieri*, ambulatory, and dependent for its legal effect upon a condition—that of liberation by the State of the accused thereunder from imprisonment, to be performed by the voluntary act of the State, acting by its proper officer; and hence the provision in our Code of Criminal Procedure, which is to be construed according to the plain import of the language in which it is written. "Art. 313. *In all cases*, when the accused *has given* the required bond, either to the magistrate or officer having him in custody, *he shall at once be set at liberty.*" The signing of the bond in proper form, in proper amount, by the principal with proper sureties, are all acts to be performed upon the part of the obligors, and must necessarily precede the giving of the bond to the officer that he may judge of its sufficiency in these respects, and approve *before* the act of liberation, which is *the condition* which the law fixes upon the obligee, to be performed by the officer having the principal in his custody, and on which depends its validity, its force in law as an executed instrument. This condition — the requirement of art. 313, before cited — complied with, then, and not till then, it becomes an *executed* contract, binding and operative in law, according to its terms, upon the principal and sureties. The liberation from imprisonment by the officer acting for the State is what gives it vitality, because that is *the* consideration which must move *voluntarily* from the obligee, and which alone supports the bond as a contract valid in law. Without this, the bond is *nudum pactum* — though good in form, it lacks the substance — a consideration moving to the principal, to support it and make it a binding contract between the State and the obligors. As between the parties, there is no such thing as *contract* without a consideration, either good or valuable in law.

In this case the *law* fixes the consideration — not in money — but what is even more *valuable in law* as well as fact — liberty. And this liberty must be bestowed by the obligee, willingly by its own act, so that the accused when "set at liberty" shall not be a *fugitive* from the accusation made against him, but thereby put from the prison cell into the "friendly custody" of his sureties, whose custody is a continuation of the original imprisonment, and thus conferring upon them who become his jailors the same right of control over his person which before was exercised by the sheriff. Without this custody, which may be constructively given to the sureties by the voluntary act of the officer in setting the *accused at liberty* (for then they may actually take his person), the bond has not performed its function. Without this is so done, the anomaly exists, if the bond is upheld, that a legal obligation may be created without consideration.

Chief Justice Savage, in delivering the opinion in the case of the *People* v. *Stager*, 10 Wendell (N. Y.), 43, uses this language: "One object of the recognizance is to obtain the enlargement of the prisoner, *and if after the recognizance* is entered into, he should not be set at liberty, the recognizance ought not to be forfeited." This "setting of the prisoner free" by the willing act of the State, is of the substance — the very essence of the bond — its only legal support; its consideration; impeached by the pleas of the appellants under oath, and by the proof sustained. Can there be a bail bond or any other kind of bond, without a consideration *a quid pro quo?* Can a case be found or an instance cited?

This bail bond must be read in the light of art. 313 of the Code of Procedure, and interpreted by it. The liberation of the principal under it would not have been more incumbent upon the State, if it had been so expressly "nominated in the bond" as a *condition to its operation*, than it was made so by the express provision of the law as enacted in the Code; which furnished the *rule of action* for the officer who took the bail bond, viz.: "In all cases where the accused *has given* the required bond, either to the magistrate or officer, he shall at once set him at liberty."

No matter whether the use which was made of the *capias* was rightful or wrongful, the stubborn fact remains that it did prevent the liberation of Walker from jail. The effect of the second arrest, and retention of Walker in Galveston jail, and his removal therefrom as a prisoner to Brazos county, and confinement in the county jail thereof (as is said by the court in the case of *Medlin et al.* v. *The Commonwealth*, 11 Bush (Ky.), 606), "was to take from the appellants the right and power to exercise that supervision and control over his actions and movements that they were entitled by law to have and exercise. It is not necessary to inquire whether the second arrest was or was not authorized by law. It is sufficient that the commonwealth, through its judicial and ministerial officers, disregarded the rights secured to King (Walker) and his sureties by the execution of the bail bond, and that *it* undertook to *hold the accused in custody.* Failing in this undertaking, it seems to us clear that it cannot now hold appellants *responsible for that failure.*" And to the same effect is the case of *The Commonwealth* v. *Bronson,* 14 B. Monroe, 361.

Justice Reeves, in delivering the opinion in the case of *Peacock* v. *The State,* 44 Texas, 13, said: "So long as Miller (the accused) was left in the custody of his bail, or was under their control, they were bound for his appearance and liable for the penalty of the bond for his non-appearance, according to the requirements of the bond. Any act done by the State or its officers under lawful authority that would *deprive* the securities of *control* over their *principal* would change their relation to the State, and would thereby release the securities of their obligation." If this be true in a case where the sureties *had* been invested with the custody of the principal by virtue of their bond, and afterward were deprived by the State of that custody, how much more in a case where they had not been so invested with his custody by the State at any time. Again says Justice Reeves: "The issuance of the *capias* for the arrest of Miller (their principal) were acts *inconsistent* with any right in the bail to the *custody* of Miller, and when he was arrested and taken by the sheriff, the *authority* of the bail over him was at an end." To the same effect, in principle, is the case of *Cooper* v. *The State,* 5 Texas Ct. App., in which Presiding Judge Ector quotes approvingly the case of *Peacock* v. *The State.* And be it here said that in both of these cases the sureties had been in the first instance invested with the custody and control of their principal, who was, when the bail bond was given, "set at liberty," but afterward they were *deprived* by *second arrest* of that custody, and the fact of such deprivation, or the legal consequences flowing from it, is not made by the court, in either case quoted, *to depend* upon the circumstance that it was for the *same* or a *different* offense, nor could it be on principle.

But, assuming for argument's sake, that the act of the State, by its agents, in causing the issuance of the *capias* from Brazos county and its lodgment with the sheriff of Galveston county would excuse in law, or render impossible, the performance of the condition on her part, to "set the accused at liberty," upon what principle of law or ethics can the State claim the forfeiture of a bond which was given, having for its object the performance of the act which by her own voluntary conduct she had made it impossible or illegal for the officer to do?

It is an elementary principle of law that, where the performance of the condition upon which the obligation of a bond depends has been rendered impossible by the law or the obligee, such obligee can claim *no benefit* under it. Bacon's Abridgment, title "Condition."

In the case of *Taylor* v. *Taintor*, 16 Wallace, 370, the court held "that if the impossibility of liberating the accused be created by the State, then, *ipso facto*, any bond given will be *nudum pactum*, and of no binding force."

Did Walker escape from the State? Or, did he escape from his sureties? The State had him, and refused to deliver him to liberty or to his sureties, but retained him at all times till he got out of her jail, where she had confined him for safe-keeping, and whose officer alone was charged with the duty and responsibility of keeping him. Art. 280, Code Crim. Proc.: "It is the duty of every sheriff to keep safely a person committed to his custody." Are these appellants to be chargeable with the fault or negligence of the jailer of the State, or the insecurity, it may be, of the locks or bolts, or walls of its prison? The obligation which they proposed to the State to take upon themselves by their bond was not that, but it was that, if he were set at liberty by the voluntary act of the State, and thus placed in their custody instead of that of the State's jailers, they would, in a penalty of $15,000, be bound for his appearance to answer to that accusation; and who will say that the principal would not so have done if the only boon which such bond could have conferred upon him had been bestowed — that of freedom? If liberated, they were willing to trust his honor for that. But more than that, if they had doubted him at any time, as was said by Justice Swayne in the case of *Taylor* v. *Taintor*, 16 Wallace, 371, *they* would have "had the right to seize him and deliver him up in their discharge; or, if that could not be done at once, *they* might imprison him until it could be done. If necessary, they might break and enter his house without process, for they would need none. This right is likened to the arrest by the sheriff of an escaping prisoner." Or, as was said by Justice Dillon in the *United States* v. *Van Fossen et al.* 1 Dillon, 410, a case in which, upon the recognizance being taken, the principal was set at liberty, "the principal was delivered into, what Blackstone calls, 'the friendly custody' of his sureties, instead of being committed to prison. 4 Blackstone's Com. 301. They thenceforth became invested with full authority *over his person*. They might take him at *any time* or *place* in the State, or beyond. *They* are his jailers; or, as Justice Wheeler puts it in *Gay* v. *The State*, 20 Texas, 507, they are his '*manucaptors*, being his jailers, and he, constantly, in a state of *commitment*,' not to the county jail, but, as Blackstone says, to 'their friendly custody.'"

In every case cited by counsel for appellee, and we have examined all, the accused was set at liberty upon the giving of the bond. No case has been cited, nor can be, to support the doctrine that, upon the giving of a bail bond and its acceptance and approval by the officer, it becomes operative, and that, to give it effect, it is not necessary that the principal should be liberated at all.

"The object of a recognizance is not to enrich the treasury (as was said by that great jurist, Chief Justice Marshall, in the case of *United States* v. *Feely*, 1 Brock. 255), but to combine the administration of criminal justice with the convenience of a person accused, but not found guilty." When guided by such a light, the judicial conscience cannot materially err.

These appellants are blameless, and if Andrew Walker was not content "to lie in cold obstruction and to rot" in jail, from which the $15,000 bond of these appellants could not extricate him, then let him who would not have done likewise cast a stone at him.

Thomas Ball, Assistant Attorney General, *M. C. McLemore*, and *Davis & Sayles*, for the State. If the principal in a bail bond be subsequently arrested by the State for an offense different from the one for which such bond was given, and such prisoner escape from the second arrest, and without excuse fail to appear in pursuance to the terms of the bail bond, then the sureties on such bond are liable under the bond to the extent of the penalty.

After Walker, the principal in the bail bond in question, had executed the bond, he was arrested by the State for an offense other than the one for which the bond had been given, and thereafter Walker escaped from the arrest, and at the time he was called to answer in pursuance to the terms of his bond he was at large, but failed to appear to answer as the bond required; and no excuse is given for such failure, except the fact of the subsequent arrest from which he escaped before he was called to answer. Bill of Rights of Texas, sec. 11; Rev. Stat. Texas, C. C. P. sec.

462; *Wheeler* v. *The State,* 38 Texas, 173; *People* v. *Bartlett,* 3 Hill, 571; *Alquire* v. *Commonwealth,* 3 B. Monroe, 349; *State* v. *Merrihew,* 47 Iowa, 112; *Steelman* v. *Mattix,* 9 Vroom (N. J.), 247; Coke-Littleton, 206; Bacon's Abridgment, "Condition;" Viner's Abridgment, "Conditions;" Hurlstone on Bonds, 48; *Ingram* v. *The State,* 25 Ala. 17; *Devine* v. *The State,* 5 Sneed, 623; *Belding* v. *The State,* 25 Ark. 315; *Burton* v. *The State,* 24 Texas, 250.

The State by its duly authorized officer having accepted and approved the bond in controversy, and the principal in the bond having delivered the same to the State, and the State having acted on the bond (with the consent of the principal) as good and sufficient for the purposes contemplated by it, and the principal having enlarged himself by his own faulty act, he and his sureties are estopped to deny the sufficient execution and delivery of the bond, and its validity for all purposes.

The bond in controversy, after having been signed, was delivered to the State through its duly authorized officer, and by said officer accepted and approved; and thereafter said principal and his sureties allowed the bond to remain in the proper office to which it was sent by the proper officer who received it, until after said principal was enlarged by his own act.

After the acceptance and approval of the bond, and release of principal from the custody of the law by the force of the bond given, the principal was taken under a new process for a different offense, and from this subsequent arrest the principal sought to discharge himself by *habeas corpus,* and failing in this, released himself by escaping from his confinement under the second arrest. Herman on Estoppels, secs. 4–9, and sec. 337; *Wheeler* v. *The State,* 38 Texas, 173; *Taylor* v. *Taintor,* 16 Wallace, 370.

The principal in the bond, after its execution and delivery, having been arrested and enlarged by his own faulty conduct, cannot set up such arrest to invalidate the bond given. *U. S.* v. *Van Fossen*, 1 Dillon, 409; *Taylor* v. *Taintor*, 16 Wallace, 370.

The principal in the bond not having appeared for trial before judgment final on the bond, no defense can be made except to the validity of the bond as a binding obligation. Code. Crim. Proc. art. 452 (1).

Horace Chilton, Assistant Attorney General, filed an able brief and argument in opposition to the motion for a rehearing.

HURT, J. One Andrew J. Walker was indicted in Galveston county for the murder of Green Butler, at the May term, 1872, of the Criminal District Court of the county of Galveston. The case was transferred, first to the District Court of Chambers, and from that court to the District Court of Liberty county. While the cause was pending in the District Court of Chambers county, Walker applied for bail, and it being denied, he applied to the Court of Appeals, and, upon the hearing, this court reversed the judgment of the district judge, and granted him bail in the sum of $15,000. On the seventh day of September, 1878, the District Court of Chambers county ordered that the said Walker be committed, for safe keeping, into the custody of C. Jordan, sheriff of Galveston county, which was accordingly done.

Walker being in the custody of the sheriff of Galveston county, the mandate of the Court of Appeals was directed to him; and by this mandate he was required, "upon the presentation of a good and sufficient bail bond in the sum of $15,000, with good security, conditioned as the law requires, for the appearance of the said Andrew J. Walker at the proper court to answer the charge preferred against him by indictment for murder, to release the said Walker from custody." He (Jordan) was further instructed to be satisfied with the solvency and sufficiency of said bond, and to indorse his approval thereof thereon, and transmit it to the clerk of the District Court of Chambers county, to be there filed in the papers of the case, etc.

The said Andrew J. Walker presented to Jordan a bond with the appellants as his sureties in the amount and in proper form; which was accepted, approved and forwarded to the clerk of the District Court of Chambers county, and by him filed with the papers in the case. Walker was in jail at the time the bond was accepted and approved by the sheriff, Jordan, and was not liberated in fact by him, for the reason that the sheriff, Jordan, had in his possession a *capias* for the arrest of Walker upon a charge of murder in Brazos county. Having accepted and approved the bond in this case, to wit: *The State* v. *Walker*, charged with the murder of Green Butler, he, while Walker was yet in his custody, arrested him upon the *capias* from Brazos. The bond in the Butler case was delivered to the sheriff on the 14th day of November, 1878. The sheriff held Walker in his custody, in the jail at Galveston, until he was turned over to the sheriff of Brazos county, which occurred on the same day, to wit: the 14th day of November, 1878. From thence he was taken by the sheriff of Brazos, and placed in the jail of that county; from which he made his escape on the 11th day of May, 1879.

At the September term, 1879, of the District Court of Liberty county, the case of *The State* v. *Walker*, charged with the murder of Green Butler, was regularly reached and called for trial. Walker not appearing, a judgment *nisi* was rendered against him and his sureties on the bond, for the amount of the penalty of the bond. At the March term, 1880, the appellants, Stafford and Allen, appeared, and for answer to the *scire facias* pleaded in substance and effect: "That the bond was inoperative and not binding, because the principal therein, Walker, had not been released thereunder from custody;

that he had never been enlarged or set at liberty, nor placed in the custody of his sureties by virtue of said bond; that at the time of its delivery to, and approval by, the sheriff, he was held, and thereafter was continuously held in custody — confined in jail — and while so held by the State of Texas, acting by its proper officers, on the 11th day of May, 1879, he broke jail and made his escape; for which the appellants were not liable." At the September term, 1880, the District Court, upon the law and facts, gave judgment final against the appellants and overruled a motion for a new trial; from which judgment the appellants prosecute their writ of error to this court.

If the answer of appellants presented a good and valid defense to the action, the evidence fully sustaining the same, there was error in the court below in rendering judgment for the State. The learned counsel for appellants, in order to demonstrate the error of the court, formulates the issue into this proposition: "When a bail bond is accepted and approved by the proper officer of the State, if the principal therein is not *enlarged* and set at liberty in pursuance of the bond, but is held in confinement in jail by such officer, or if, having been set at liberty in pursuance of such bail bond, whereby he is put into the custody of his sureties, they are thereafter deprived of the custody of the principal by the State, acting through its proper officers, and he escapes therefrom, the bond, in either case, imposes no obligation on the makers, and is not subject to forfeiture for non-appearance of the principal."

This is a very ingenious and plausible proposition. It stands, apparently, remarkably near the proposition made by the facts in this case; but upon a closer view it will be seen that there is quite a space between them. This proposition approaches very nearly the correct legal proposition. If in the first paragraph it had contained or alleged the fact that the principal was held *by virtue* of the *capias* or *mittimus* under the *same charge*, or if it had stated in the second clause that the principal was held by the State *at the time* of the forfeiture, we would not be disposed to question the conclusion that the liability of the sureties was discharged.

In this case, however, neither of these facts enter into its make-up. The bond was taken, approved and sent to the clerk of the proper court by the sheriff; and he states that he held the principal, not by virtue of the *mittimus*, but the *capias* from Brazos. At the time of the forfeiture the principal was not held by the State at all; he was perfectly free, and there was no obstacle in the way of his appearance, from any cause whatever. If the principal had been held in custody by virtue of the *mittimus* from Chambers county, or if released and arrested again on the *same charge* by the State or its authority, these acts would be inconsistent with and a repudiation of the bond. Again, if, at the time of the forfeiture, the principal was in the custody of the State upon the same or any other charge, these facts would constitute a good answer to that forfeiture *thus* taken while the principal was *held by the State.*

Counsel for appellant in argument concede that if there had been but a moment of actual liberty given to the principal before the second arrest, the sureties' liability would have attached. Upon what principle? One of consideration? Suppose the State had held the principal to within a day of the trial — say six months — and discharged him from custody, if this is a question of consideration, should there not have been an apportionment? The learned counsel for appellant concede in argument that the bond would have been operative if the principal had been liberated for the shortest space of time, though he were again arrested and deprived of his liberty by the State, on another charge, up to the time of his escape. If, then, the State could have legally, without discharge of sureties, arrested the principal upon another charge, immediately after their liberating him, the principle must be nice indeed which operates a denial of the State the right to arrest without first liberating the principal. This distinction is so nice that to give it effect there should be a clear and satisfactory reason. The denial of this principle operates not the slightest injury to principal or sureties. The bond was accepted and approved by the proper officer, after having been presented for that purpose, or with the intention that it should be accepted by the officer; and, if the sureties were not willing for it to operate and be in force, they had the right to surrender their principal, though in custody, at any time *before the forfeiture.*

Let us view this question from another standpoint. The position assumed by appellants is, that, as their principal was arrested by the officer before actual liberty was given under the bond, and the principal escaped, therefore they are not liable. Now suppose the second arrest had been made upon a charge of gaming, and an escape had occurred? If correct, the principle contended for would apply; and the sureties in a murder case, when the principal was held in fact for the misdemeanor, would be released. If the escape was through the negligence of the officer, would he, under the Penal Code, be answerable for an escape in the felony or the misdemeanor? The facts and circumstances attending the execution of this bond were calculated to lead to the belief that, as far as regards the Green Butler case, the execution of the bond was full and complete; hence the officer would not be held to that degree of care in the custody of Walker, in case of arrest for misdemeanor, as if no bond had been given. We therefore conclude that when the bond was presented by appellants to the sheriff, and accepted, approved and forwarded to the clerk of the proper District Court, it became operative, with full and complete binding effect, upon the sureties. Nor was it necessary, to give it effect, that the principal should have been liberated at all. All that was required to give it force and effect was, that the minds of the parties met on and agreed to its presentation to, and acceptance by, the officer, and that it *was* so presented to and accepted by the officer.

Having been thus presented and accepted, to release the sureties of liability the State must re-arrest the principal upon the same charge, thereby repudiating the bond,— the contract,— or the State must have the custody of the principal upon the same or any other charge, at the *time* the forfeiture was taken, or so near thereto as to prevent the attendance of the principal.

In this case it is not possible to perceive in what manner the State contributed to the failure to attend by the principal. At the time of the forfeiture their principal was at large with perfect freedom to attend and answer the charge, as he was required by his bond. Being at liberty to attend the trial, we are at a loss to understand how the failure to give him actual freedom could have the slightest tendency to prevent his attending.

We have examined with care and great interest the *very* able briefs of the appellant and the State, and in these will be found a clear and concise statement of the question at issue, with all the authorities that we have been able to find, after a most thorough investigation. These briefs contain such a clear presentation of the point in issue that we suggest that the student of law will derive more satisfaction and information from them than by reading this opinion. After having given the record a most careful examination, we can find no error for which the judgment should be reversed. The judgment is affirmed.

Affirmed.

BERNARDO LANDIN *v.* THE STATE.

THEFT — INTENT.— Not only must there be a taking of the property of another without his consent, but the mind must intend a fraudulent taking with intent to defraud the owner of the value thereof; otherwise the offense of theft is not made out. Note the facts of this case in illustration.

APPEAL from the District Court of Webb. Tried below before the HON. J. C. RUSSELL.

The appellant was indicted for the theft, in Webb county, on or about the 6th day of May, 1880, of one steer, the property of one Peter Steffian. His trial resulted in conviction, with two years' confinement in the penitentiary assessed as his punishment.

Vicente Flores, inspector of hides and animals of Webb county, testified for the State that early on the morning of May 9, 1880, with the sheriff and posse he arrived at the ranche of defendant's mother, and saw her and two of her sons, brothers of the defendant, and also an old man named B. Martinez. He saw some of the meat of an animal killed some three or four days before, part of it being in the house and part hanging out under a shed. He found a pair of bovine ears lying between the timbers of the fence, some four or five yards from the house. The defendant's mother told witness, at the time, that these were the ears of an animal that they had killed at the ranche. These ears bore the ear-mark of P. Steffian. Macedonio, defendant's brother, showed the witness the hide of the animal, which was cut in strips and pieces,— some made into long strips for tying yokes to the horns of cattle, and some into long, thin strips, such as are used by the Mexicans for thatching jacals. These pieces were about forty yards from the house, in the field, near an old dry-lagoon. The portion of the hide that bore the brand had not been cut, but was entire, and was secured by the witness. It was Steffian's brand. The sheriff arrested Macedonio, the defendant's brother, who was brought to town by the witness and two rangers. The defendant's mother told the witness at the ranche that she had sent her eldest son, the defendant, to bring in a beef for slaughter, as they were out of meat, intending to pay the owner, whomsoever he might prove to be,—that they did not know to whom the animal belonged when first brought in, but learned afterwards that the brand was that of Peter Steffian.

Cross-examined, the witness stated that the defendant was at no time present during the conference at the ranche. No part of the meat was concealed, but lay openly in the jacal on a table. The mother cooked some of it for the party and they breakfasted on it. She owns and controls the ranche, which is situated about eight leagues distant from Laredo, and defendant lives with her. No one of the family made any denial or concealment of the killing of the animal, or of any part of the meat.

B. Martinez, for the State, testified that the beef in question was brought to the ranche by the defendant about three or four o'clock, P. M., and slaughtered at about nightfall of the same day, by himself, witness, the defendant and his brother Macedonio. The mother sent defendant and her younger son, Simon, to drive up a beef belonging to anyone, as they were entirely out of meat, saying that they would pay the owner for the animal. The defendant brought in the animal, and said he drove it from the Cerrito. It was killed openly, where it was tied up, within fifteen yards of the public road. When he first drove up the animal the defendant said that he did not know who owned it, but, upon examining the brand before killing it, he said that it belonged to Peter Steffian. The hide was staked and stretched out at the same spot until next day, when it was cut into strips to tie the rafters of a jacal they were building on the ranche. The defendant then took them into a field to put them into a lagoon, but finding it dried up, he threw them down, and said he would leave them there until he returned from Laredo, when he would take them to the arroyo. On Friday the defendant took some meat to the ranche of Las Tiendas. On Saturday he started to town, and said to witness that he was going for the purpose of paying Steffian for the beef. On Sunday witness was brought to town by the sheriff as a witness. The defendant's mother sent portions of the meat to all the neighbors living in the vicinity. The ears were cut off, and defendant directed his brother to put them on the fence that they might be preserved to identify the ownership; which he did, but they subsequently fell to the ground, where they were found. Flores, the first witness, was corroborated by Dario Gonzales, sheriff, who testified also that he learned the facts from Martinez as stated by the latter on the trial. He first got the ears from Flores.

By the records of marks and brands of Webb county, and by the owner, the property was proved to be that of P. Steffian. Steffian testified further that he had never given defendant authority to kill any of his cattle.

The substance of the testimony of the defendant's mother and his brother Macedonio was that, the family being out of anything to eat, the mother despatched the defendant and a younger brother, on Thursday, to drive up a beef to slaughter, saying she would pay the owner, whoever he might prove to be. Accordingly the animal in question was driven up openly, and openly slaughtered within fifteen steps of the public road. When first driven to the house they were ignorant of the owner of the animal, and the mother sent her son to her neighbor, Pascual Arcia, requesting him to come and see if he could recognize the animal. He did not arrive before the animal was killed, and a copy of the brand and ears were secured and kept by the mother. When Arcia subsequently arrived the copy of the brand was shown to him and he pronounced it that of Steffian. The ears, it was testified by mother and son, were preserved by the mother in the house, and by her were delivered to Sheriff Gonzales. The defendant, on Saturday, was sent by the mother to town to pay Steffian. The mother owned a flock of sheep and goats and some cows and calves, but they were herded out by contract. The mother testified further, that, after the arrest of defendant, she went to Steffian and offered to pay for the animal, but he refused to accept pay. She had long dealt with Steffian, obtaining credit at his store often, and had always been willing, ready and able to pay for the steer.

Pascual Arcia testified that he received a message from the defendant's mother to go to her ranche to identify a steer; that he did not arrive before the killing, but afterwards was shown by the mother a brand on a paper, and he told her it was Steffian's brand. This was on May 26.

Pedro Martinez testified, for the defense, that he was at the ranche of defendant's mother on the 5th of May, about nightfall, and found defendant and others dressing a yellow beef steer. He did not examine the brand, but was then told that it was Steffian's steer.

Bruni, a deputy sheriff, testified that he arrested defendant about noon on Sunday, May 9, at his mother's house in Laredo, while in bed asleep. He had come to town during the day or night previous, and had no money about his person.

No brief for the appellant has reached the hands of the reporters.

Thos. Ball, Assistant Attorney General, for the State.

Hurt, J. The appellant was convicted of theft of a steer. The charge of the court is a full, fair and pointed application of the law to every phase of the case as made by the facts. The trial, judging from the record, was in every particular legal, and eminently fair to the appellant.

There remains but one question: Does the evidence support the verdict? We think not. The fraudulent intent is wanting. Criminal jurisprudence differs more from civil concerning *intent* than upon any other point. If one does an act injurious to another, though not influenced by an evil mind nor intending the same, he shall be held the loser, rather than the other, under many circumstances in which no blame can be attached. Not so in criminal law, for crime proceeds only from a criminal mind; and especially is this the case with regard to theft. "There is but one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. Criminal law relates only to crime, and neither in philosophical speculation nor in religious or moral sentiment would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the *essence* of an offense is the wrongful *intent*, without which it cannot exist." 1 Bish. Crim. Law, 370.

To constitute theft there must not only be a taking of the property of another without his consent, but the mind must intend a fraudulent taking with intent to defraud the owner of the value of the property.

The statement of facts will be reported, and from the facts it will be seen that (giving the evidence all of its strength and viewing it in the most unfavorable light to the appellant) there is no proof even tending to show a fraudulent intent; but, on the other hand, every fact, save the taking of another's property without his consent, refutes it completely. We therefore conclude that the court below erred in overruling the motion for a new trial; for which error the judgment is reversed and the cause remanded.

Reversed and remanded.

JAMES BRIGHT *v.* THE STATE.

1. CHARGE OF THE COURT.—See "statement of the case" for a charge of the court *held* to be a correct exposition of the law of homicide and responsive to the issues presented by the evidence.
2. PRACTICE IN THIS COURT.—There being two contrary theories advanced on the trial and supported by evidence, and the jury having given credence to that of the State, and the trial judge having refused a new trial, this court will not disturb the verdict.

APPEAL from the District Court of Fannin. Tried below before the Hon. R. R. GAINES.

The indictment charged the appellant with the murder of his father, George C. Bright, in Fannin county, on the 10th day of February, 1875. He was convicted of murder in the second degree and awarded twenty-two years in the penitentiary.

The judge's charge, upon which the main issue arose on appeal, is here incorporated in full, as directed by the court. After the caption, the charge reads:

"The defendant is charged by the bill of indictment, which has been read before you, with the crime of murder in the first degree, alleged to have been committed upon the body of George C. Bright; and, having been duly arraigned, has entered his plea of not guilty.

"Under the indictment the defendant may be found guilty of murder in the first degree, or of murder in the second degree, or of manslaughter, or not guilty, as the evidence may warrant under the instructions which I shall give you in this charge.

"Where one man intentionally kills another, it depends upon the circumstances attending the killing whether the act is justifiable or not, and, if not justifiable, of the degree of his guilt.

"Every person who unlawfully kills another in this State with malice aforethought, either express or implied, is deemed guilty of murder. Malice in this definition is used in its legal sense and signifies the intentional doing of a wrongful act without legal justification or excuse, or circumstances of mitigation. Hence when a killing occurs and the circumstances are absent which would excuse or justify the killing, or reduce it to manslaughter, the law implies malice in the killing and it is murder.

"When the malice is implied merely, it is murder in the second degree; but when the malice is express it is murder in the first degree. Express malice is when one, with a sedate and deliberate mind and formed design, kills another, which formed design is evidenced by external circumstances discovering that inward intention, such as former grudges, antecedent menaces, deliberate compassings or concerted schemes to do him some serious bodily injury.

"Manslaughter is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither excused nor justified by law. It is meant by this, that the offense must be committed under the immediate influence of the passion aroused at the time of the killing, and must not be the result of some former provocation. By 'adequate cause' in the above definition is meant that the passion (which may be either anger, rage, sudden resentment or terror) must spring from some provocation sufficient to produce, in the mind of a man of ordinary temper, such a degree of some one of these mental emotions as to render him incapable of cool reflection.

"Homicide is justifiable and subject to no punishment when committed in self-defense or in defense of any third person, under the following limitations: Self-defense is when one is unlawfully attacked by another in such manner as produces in his mind a reasonable fear or apprehension of death or of some serious bodily injury from the attack, and kills his assailant in order to protect himself. Homicide is permitted in defense of another person, but it must reasonably appear, by the acts or by the words coupled with the acts of the person killed, that he intended to take the life of such third person, or to deprive such third person of some member of the body. In addition to this, the killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing an evident intention to commit such offense.

"Having given you the general definition of the several degrees of homicide, so far as the evidence in this case renders the definition proper, I will give you the general rule of evidence which is to guide you in making up your verdict. The defendant is presumed to be innocent until his guilt is established by legal evidence; and in case of a reasonable doubt as to his guilt, he is entitled to be acquitted.

"I therefore charge you that, if you believe from the evidence beyond a reasonable doubt that defendant, in Fannin county, at any time before the finding of the indictment in this case, shot George C. Bright with a shotgun, and thereby killed him, you will inquire into the circumstances attending the killing as shown by the evidence, in order to determine whether he is guilty or not, and if guilty, what is the degree of his guilt; and in doing this, you will be governed by the following instructions:

"If, at the time of the killing, George Bright was advancing upon the defendant and made such demonstration as to produce in the mind of defendant a reasonable expectation or fear of death, or of some serious bodily injury, and defendant killed him in order to protect himself, defendant is not guilty. In such case, in order to justify defendant, it is not necessary that the danger should be real. It would be sufficient if the appearances were sufficient to produce in his mind a reasonable apprehension of the loss of life or of some serious bodily harm.

"Or if George Bright had threatened to take the life of defendant, and defendant knew of the threats, and, at the time of the killing, George Bright by any act then done manifested an intention to execute the threat so made, then defendant is justifiable. But if George Bright at the time of the shooting was making no demonstration showing an intent to carry his threat into execution, the threats would not constitute a justification.

"Furthermore, if defendant shot George Bright in order to protect his mother, and if at the time of the shooting it necessarily appeared from the acts, or the words coupled with the acts of the deceased, that it was his (deceased's) purpose and intent to take the life of defendant's mother, or to maim her by depriving her of any member of her body, and if at the time deceased had done some act showing evidently an immediate design to execute such purpose and intent, defendant is justifiable; and in determining this question you have a right to consider any threats made by the deceased against the life of defendant's mother (if any) or any previous act of his showing a deadly hostility towards her (if any has been by the testimony). But I charge you that such previous threats or demonstrations would not of themselves constitute a justification unless at the time of the killing he was doing some act manifesting an immediate intention to execute such threats. Unless you are satisfied by the evidence beyond a reasonable doubt that defendant was not justified under the instructions above given, you will find him not guilty. But if you are so satisfied that defendant's act was not justifiable, and if you find from the evidence that defendant killed the deceased under the immediate influence of sudden passion arising from some provocation sufficient to render a man of ordinary temper incapable of cool reflection, you will find defendant guilty of manslaughter.

"If you find that defendant killed George Bright, and you are satisfied beyond a reasonable doubt that the act was not justifiable, and that it was not committed under the immediate influence of sudden passion, arising from some cause adequate to reduce a killing from murder to manslaughter, you will find defendant guilty of murder; and if you are further so satisfied beyond a reasonable doubt, that, at the time defendant formed the design to take the life of the deceased, his mind was calm and deliberate, and capable of cool reflection, and that he took the life of the deceased in pursuance of such design, you will find him guilty of murder in the first degree; but if you do not find that the murder took place in pursuance of such deliberately formed design, you will find him guilty of murder in the second degree.

"Defendant is not only entitled to the benefit of any reasonable doubts as to his guilt, but also as to the degree of his guilt.

"You are the judges of the facts, of the credibility of the witnesses, and of the weight of the testimony.

"If you find defendant guilty of murder in the first degree, you will assess his punishment at death or confinement in the penitentiary for life, as you may determine in your own discretion.

"If you find him guilty of murder in the second degree, you will assess his punishment at confinement in the penitentiary for any term not less than five years. If you find him guilty of manslaughter, you will assess his punishment at confinement in the penitentiary for any term not less than two nor more than five years.

"If you find defendant not guilty, you will simply say so by your verdict."

The evidence discloses about this state of case: J. W. McElwee, for the State, testified that he lived at the time of the killing, and had lived for some years, about a quarter or a half mile from the home of deceased in Fannin county. Early in the morning on the day of the homicide, but after sun-up, the witness was in his field, and heard a gun fire from about the house of deceased, and heard some one exclaim "Lord have mercy." He thought then that it was the deceased, though it may have been some other member of the family. Within twenty or thirty minutes thereafter, Henry Bright, son of the deceased, came for the witness and asked him to go to the house. The witness, in company with J. S. Carpenter, went to the house about one hour after the firing of the gun, and found the deceased lying dead in the yard, about ten steps south of the house. No one was near the body when witness and Carpenter arrived. The two took the body into the house and laid it on the bed. When the witness reached the body of the deceased the hair and beard were wet and uncombed, and drops of water were clinging to the beard. No weapons were found on his person, but an ordinary pocket knife and a bunch of keys were in his pocket. There was a wound in the left side of deceased, which appeared to have been made by a load of shot. The shot appeared to have gone through the muscles of the left arm, between the elbow and shoulder, tearing a large hole, penetrating the left side, and ranging downwards and backwards, and they appeared to have gone in in a bunch and without scattering much. The wound was sufficient to cause death. There was a pool of blood where the body lay, but witness saw no blood elsewhere, but looked for none. The defendant is a son of the deceased and lived on the place with him. The witness did not see him on the place that morning. This all occurred in Fannin county, Texas, in the latter part of February, 1875.

J. S. Carpenter, for the State, testified to the same effect as McElwee, and, in addition, that in November, 1874, the deceased was preparing to fight a duel with one Rool, whom he accused of being too intimate with his wife. Deceased was immediately apprehended, brought before

W. E. Dailey, justice of the peace of Fannin county, and placed under bond to keep the peace towards Rool and all other persons for one year. Deceased refused to give bond and was confined in the Fannin county jail for two or three weeks, when he changed his mind, gave bond and was released; the witness, A. Yoakum, A. J. Nicholson and W. B. Allen, becoming sureties on the peace bond. After his release, the deceased went to the house of witness and remained there a week or two, and then went home, and was killed fifteen or twenty days afterwards. Witness was at the deceased's house the day before the homicide, and about nine or ten o'clock, A. M., heard the deceased tell his little boy, Henry, to go with him to the field to pick cotton. The boy refused, saying his mother had directed him to do some work about the garden. The deceased thereupon whipped him severely, but not more than witness thought was deserved. The last the witness saw of deceased, he was pushing the boy, Henry, before him towards the cotton patch. The deceased was then staying at home.

On this same day — the day before the killing — in the evening, the defendant came to the witness in his field, and requested him to surrender the deceased on his peace bond. The witness asked why, and the defendant replied that the deceased was abusing his family. The witness asked him, then, if he referred to the chastisement of Henry in the morning, and defendant replied that he did. The witness then declined to do as requested, saying that he believed deceased had a right to control his family. The defendant then rode off, saying, "if the worst must come to the worst, the sooner the better," and appeared angry and dissatisfied with his father. The deceased had a large family of children.

John A. Stanley testified, for the State, that he lived on the deceased's place at the time of the homicide, in a house about one quarter of a mile from the deceased's house, east. He heard the shot on the morning of the killing, and went to the house within twenty or thirty minutes afterwards. He met the defendant near the gate some hundred yards from the house, with his saddle-bags on his arm, going towards his horse which was saddled and hitched at the gate. The defendant said to witness, "the difficulty is settled at last between me and pa." Witness asked, "how?" and defendant replied, "I have killed him." The defendant told witness then that the deceased was not armed. The witness asked the defendant what the deceased was doing when killed, and he replied that he was "cutting up," abusing and villifying him, defendant, and his mother. He asked the witness then what he should do, and witness told him that if it were he, witness, he would leave. Defendant returned to the house with witness, saying he would bid his mother and sisters farewell; he then left and witness saw no more of him until about one year before this trial, when he saw him in the Fannin county court house.

A few days before the killing the defendant told the witness that the deceased had refused to let him, defendant, have a pair of mules unless he should take them by force; that he then took a gun and started toward the lot, when the deceased asked him, "what he was going to do with that gun?"—that he replied, "You told me that I would have to take them by force of arms, and I am doing so." Defendant told the witness that he took the mules. The witness further testified that, a few days before the homicide, he heard the deceased say that he would control his family or he would kill every one of them. He, witness, saw Henry Bright's arm the evening after he was whipped, and it was beat blue. The defendant told witness, the day before the killing, that he had been to see Jake Carpenter to ascertain if the deceased's bondsmen were going to permit the deceased to beat his children to death; that Carpenter insulted him, and he told Carpenter that if the worst must come to the worst, the sooner the better. The witness was the first to reach the dead body. There were no weapons about the body.

R. C. Stanley, who lived about one mile from the scene of the killing, testified for the State that, a few days before the occurrence, the defendant was at his (witness') mother's house, and said that he had just returned from Honey Grove. The defendant spoke of the difficulty between his father and mother, and said that if he had to leave the country, he would leave his mother out of distress, and that he would "settle" the next "fuss" that came up. The witness' mother said to him, "For God Almighty's sake, Jim, don't never think of killing your father." The defendant repeated that if he had to leave the country he would leave his mother out of distress. He had some buck-shot in his hand at the time, and spoke of them in connection with his father, but the witness did not remember the words he used.

Smith Lipscomb testified, for the State, that he had been sheriff and deputy sheriff of Fannin county for six years, and remembers the time of the killing of deceased. Very soon after the killing a writ for defendant was placed in his hands and he made diligent search for, but failed to hear anything of defendant. About a year before this trial defendant telegraphed him from Honey Grove, that he was there, and to come and get him. Witness went and arrested him there.

R. T. Williamson, who was on the coroner's jury at the inquest on the body of deceased, testified to the character of the wound, asserting that from appearances the deceased, when shot, must have been in a stooping position, or else the person shooting must have shot from higher standing ground than that occupied by deceased. This witness stated that he had no prejudice in this matter; that he had declined overtures of several to undertake the making up of a purse to defray the expense of defendant's capture, but did agree to contribute five dollars for that purpose.

Nicholson and Adams both testified that before the shooting defendant requested them to surrender deceased on his peace bond, assigning no other reason than that deceased was "cutting up." Adams refused, and Nicholson agreed to do so on condition that the other sureties would.

Mrs. Amanda Bright testified for the defense that she was the wife of the deceased and the mother of the defendant. She had been separated from her husband from the 2d day of November, 1874 (on which day he accused her of improper intimacy with a man named Rool), up to the day of the killing. She was then the mother of ten living children by the deceased, and within two months of her eleventh confinement, and in a very helpless condition. On the morning he first accused her, November 2d, 1874, the deceased threatened to bring men to prove her want of virtue, and said that she should leave and take none of the children with her. Deceased said on this occasion that if the men did not state that witness was guilty, and if she then did not acknowledge it, he would kill her; and to the defendant he said: "Jimmie, if you do not stop taking sides with your mother, I will put you out of the way." At this time the youngest child of witness was upon its death-bed. On the next day, the deceased said that he had seen the man and he would not acknowledge, and that now if witness did not he would put her out of the way. At the same time he said to the defendant, who was standing near, that he, defendant, was taking sides with witness, but that it would do no good — that he would put defendant out of the way too; that defendant should not always be around to protect witness.

A few days subsequently the deceased sent for Adam Yoakum and his wife to stay all night at the house, because he, deceased, was going to fight a duel with Rool. Early next morning witness and defendant were sitting in witness' room, near the chimney, between which and the wall there was a large crack. While sitting there she saw the muzzle of a gun run through the crack, and defendant, who saw it at the same time, jerked her behind the door, out of range. Just before the gun was run through the crack, some one made an effort to open the south door of the room. The door was about to give away, when Mr. and Mrs. Yoakum rushed into the room and to the door, and Mr. Yoakum told defendant, who was about to open the door, not to do it, that the deceased was there with a gun. Mr. Yoakum and defendant then pushed the door to. Deceased demanded that they open the door, as he wanted to bid the baby goodbye. Mr. and Mrs. Yoakum took the baby to the shed-room, and witness saw no more of deceased that day. He and Yoakum went off together in the direction of Honey Grove.

Shortly after his return from jail, the witness thinks in December, the deceased came to the house and approached witness with both hands in his pockets, and with a very vicious look on his face. The defendant stepped between the deceased and witness, and deceased ordered him to go to his work at the stable. The defendant answered that he would not as long as witness was in danger.

About the 13th or 14th of February the deceased left, and said he was going to Bonham. On his return that night he went into the room where the witness, defendant and the other children were, and said that he had armed himself, that he wanted it well understood that he intended to settle this difficulty. He then started to the room in which he slept, and as he started dropped a bullet, which witness' little daughter picked up.

When the defendant went to see the bondsmen, the witness was afraid to stay in the house, and went to the barn, where the children were milking, and remained there until the defendant returned. While there she saw the deceased slipping through the cotton rows, until he got behind a hay-stack which stood near the road which defendant had to travel going to and from where the bondsmen lived. Late in the evening the defendant returned, but before he got to the hay-stack he diverged from the road as though to avoid something, came on to where witness and the children were, and all went to the house together. This was on the evening before the killing.

Early next morning the deceased broke open the witness' room door, and ordered Henry to get up and make a fire. The defendant got up and made the fire, and Henry got witness to fix his arm in a sling. The defendant, after making the fire, went down to feed, and when through, came back to witness' room and said to her, "Pa is in a terrible rage this morning." The witness' room was north of and adjoining the stove room. While the defendant was in witness' room, the deceased came into the stove room, where witness was getting breakfast, and got some water in a wash-pan. As he was going out he said, "This thing has got to be settled right now, if there are none left to tell tales." In a very short time he came back to the stove room door, ran his left hand in his pocket (witness did not see his right), and stepped in the door with his left foot, his left side turned towards defendant, who was standing in the door between the rooms, and was stooping to avoid the top of the door, which was very low. The defendant then jerked the witness back, and exclaimed, "Pa, this is no way to settle difficulties," and raised his gun and fired as deceased stepped in the door. Defendant was so weak from a recent spell of sickness that he could scarcely raise the gun; was very much excited and was shedding tears, and the children were screaming at the top of their voices. The killing was done on the 24th of February, 1875.

On cross-examination, the witness stated that after the deceased was released from jail in December, 1874, he lived at home with the exception of a few weeks he boarded at Carpenter's. He slept in his own room. Witness and defendant had each a spell of sickness during the month of January. The deceased sat up but one night, and Carpenter was there that night. The deceased had no opportunity to kill the witness from the time he went to Honey Grove to fight the duel up to the time that he was killed, as either the defendant or Pope Guthery were with her at the house all the time. Witness testified before the coroner's jury. If she stated then that deceased put his right foot in the door, made no demonstrations, but stood in the door with his right hand on the facing, she does not remember it. She was so weak at the time she could sit up only with much difficulty. It was immediately after the shooting, and she was so much confused she hardly knew what she was doing. She did not go out where the deceased's body was lying, but sent the children out to protect it from the fowls. The defendant was 26 years old on trial.

Mrs. Nannie Guthery, daughter of the deceased and the last witness, testified substantially as her mother, but to a few additional facts. Referring to the morning that deceased was to fight the duel, on which the last witness testified the gun was pointed through the crack at the chimney, Mrs. Guthery testified that she saw her father, the deceased, priming or picking powder into the tube of his gun, at a point immediately south of the house, and thinks that, when through, he capped the gun. She saw him start towards Mrs. Bright's room, to which she went. She then describes the occurrences as described by her mother, except that she was not in a position to see the muzzle of the gun said to have been inserted in the crack.

She stated that she was the daughter who picked up the bullet dropped by the deceased on the night of his return from Bonham, and that, when she offered it to him next morning, he said "never mind," that he had "plenty more." She had told defendant of this. She stated further that she heard her father, when he turned from the door on the morning of the killing, when he called Henry to make the fire, say that he "intended to put yesterday's words into effect;" and she heard Henry tell defendant, the evening before, that the deceased said that morning that he intended to kill defendant before twenty-four hours. This witness described the attitudes and positions of the parties at the killing exactly as did Mrs. Bright, except that she stated that it was his right hand the deceased run in his pocket as he stepped into the door when shot. Otherwise her testimony recapitulates her mother's.

On cross-examination she stated that she did not remember having stated before the coroner's jury that the deceased had stopped in the door with his right hand on the facing, when shot.

Henry Bright, a brother of the defendant, testified that, one evening about the last of December, after deceased had been released from jail, and while he was boarding at Carpenter's, the deceased rode up to defendant and witness near a well, and had some conversation with them. During the time, the deceased put his hand in the left side of his bosom, or in his coat pocket, looking straight at defendant, and witness heard something in his pocket click twice, like a pistol. Deceased rode off without saying anything after the clicks. Referring to the evening before the killing, he testified that while he and deceased were at work in the cotton patch, they saw the defendant ride off, and deceased asked him if he knew where defendant was going, and he answered that he did not. The deceased then said that defendant was going to get his bondsmen to give him up, and that he, deceased, intended to kill defendant before twenty-four hours. Witness told defendant of this threat, that evening, in the presence of his mother and sisters. He stated that, on the morning of the killing, after defendant had gone to the horse-lot, he and others in the house heard loud talking in the direction of the lot, and his mother sent him to see what was the matter. On going out he saw defendant coming towards the house with deceased following, talking angrily and excited. About half way between the lot and house, deceased caught up with defendant, took him by the arm and said, "I tell you that this taking sides with your mother has got to stop or I'll put you out of the way." Defendant pulled loose and went into Mrs. Bright's room, into which witness followed. Some conversation between defendant and Mrs. Bright ensued, but witness' arm pained him so that he paid no attention to it. He did not see the gun fired.

Mrs. Yoakum, for the defense, testified that herself and husband, on or about the 3d of November, 1874, stayed all night at the house of deceased. About ten o'clock that night, the witness and Mrs. Bright went to bed in the big room. Shortly afterwards the deceased came into the same room and made a pallet on the floor at the foot of the bed, whereupon Mrs. Bright got up, went to her own room, and sent her daughter Nannie to sleep with witness. At a late hour the witness fell asleep, leaving the lamp burning. Between midnight and day the witness was awakened by some one creeping along the floor in sock-feet. The lamp was out, and the person appeared to be approaching a table from the pallet. When the person got to the table witness heard something rattle like caps. The person then turned to that portion of the room where the gun-rack was, over the door, and took down something which witness supposed to be a gun. The person then passed out of that door into a shed-room, and out of the shed-room door that led outside of the house. The witness saw the deceased about sun-up next morning. He was standing near the southeast corner of the shed-room, close to a locust tree, loading a gun. After loading the gun he seemed to cap it, and after that he started west towards Mrs. Bright's room. Witness was then standing in the door of the southeast shed-room. When deceased started he slipped along with his gun in a shooting position, as though he was going to shoot something. The witness then ran into Mrs. Bright's room, and her narrative from here regarding deceased's effort to force the door, and subsequently calling for his baby to say good-bye, which was taken to him by witness and her husband, is substantially as related by other witnesses.

Adam Yoakum testified for the defense. He saw deceased approaching Mrs. Bright's room from the southeast shed-room in manner as described by the last witness, and prevented defendant from opening the door. He then went with deceased to Honey Grove, and with others had him put under peace bonds, subsequently becoming one of his bondsmen.

Jeff Bright testified that when deceased left the door and went towards the chimney he cocked his gun, but witness did not see what he did with the gun.

John Blair testified for the defense that he examined the premises the morning of the shooting, after the killing, and saw shot holes in the smoke house in range of the positions said to have been occupied by deceased and defendant when the shooting occurred. The shot struck about three feet from the ground. The outside door, through which deceased is said to have started when shot, is about four and a half feet high. The floor of the door in which defendant is said to have stood when he shot is seven or eight inches higher than that of the other door spoken of. Deceased was about 42 years old, and small but very stout.

Recalled by the State, in rebuttal, McElwee testified that during their sickness in January, deceased sat up two nights and waited on Mrs. Bright and defendant. Carpenter testified to another, and still another night he saw deceased waiting on them. McElwee, R. T. Williamson and J. B. McKee, also testified, in rebuttal, that they were members of the coroner's jury, and that before that jury both Mrs. Bright and Nannie Bright, now Mrs. Guthery, testified that, when the deceased was shot, he had just stepped his right foot up on the door, placed his right hand on the facing and was making no demonstrations.

On the contrary, V. Peyton, a member of coroner's jury, and W. E. Dailey, the justice of the peace who held the inquest and took down the evidence, testified, in rebuttal to the State, that both Mrs. Bright and Mrs. Guthery testified before the coroner's inquest that the deceased was advancing and entering the door when he was shot.

The defense moved for a new trial, but the court below overruled the motion, and the defense gave notice of appeal.

R. B. Semple, for the appellant. (1) The first error complained of by appellant is that the court erred in failing to charge the jury that insulting words or conduct of the person killed towards a female relative of the party guilty of the homicide are adequate cause to reduce the killing from murder to manslaughter. Art. 597, Penal Code.

(2) The second error is that the court erred in failing to charge the jury that homicide is permitted in defense of another when it reasonably appears by the acts, or by the words coupled with the acts, of the person killed that he

intended to take the life of such third person or do him some serious bodily injury. Arts. 570, 572, 574, Penal Code.

(3) The third error is that the court erred in charging the jury that where the killing takes place in defense of another the threatened violence must show that the party killed either intended to take the life of such third party or deprive him of some member of the body, when the statute says that such violence must only be such as produces a reasonable expectation or fear of death or some serious bodily injury. Art. 574, Penal Code.

(4) The fourth error is that the court erred in charging the jury that if they did not find that the killing took place in pursuance of a deliberately formed design, they should find the appellant guilty of murder in the second degree; which, appellant respectfully submits, is in effect to charge the jury that if they did not find him guilty of murder in the first degree, they should in any event find him guilty of murder in the second degree, as they did do.

Horace Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of murder of the second degree, and his punishment assessed at confinement in the penitentiary for the term of twenty-two years. This case was submitted at the Tyler term, and we have had it under consideration from that time until now, giving it our most serious attention.

There is but one point seriously urged by counsel why the judgment should be reversed, and that is a supposed defect in the charge of the court. After having given the charge, time after time, the most thorough examination commensurate with our humble ability, we are forced to the conclusion that the law of the case was given therein to the jury.

[The reporters will give the evidence and charge of the court.]

There were two theories — one inculpatory and the other exculpatory. The jury, whose duty it was, passed upon these theories, finding in favor of that of the State. The presiding judge was called upon (by motion for new trial) to review the correctness of their finding. It being approved by him, who heard the witnesses, saw their bearing and manner of testifying, we are not prepared to say that their finding was wrong. If the theory of the State was true, the defendant was guilty of murder, at least, of the second degree. There was evidence clearly and satisfactorily supporting that theory, and the jury having by their verdict passed upon and determined which of these conflicting theories was true, we will not disturb their conclusion.

There is no question presented in the record which has not been ably and exhaustively discussed by this court in cases already reported. *Kendall* v. *The State*, 8 Texas Ct. App. 569; *Ainsworth* v. *The State*, 8 Texas Ct. App. 532. See also *Horbach* v. *The State*, 43 Texas, 258. And see also those cases for thorough discussions of the law bearing on this case. The judgment is affirmed.

Affirmed.

VISER & CARSON *v.* THE STATE.

1. OCCUPATION TAX — RECOGNIZANCE which recited the offense to be "unlawfully pursuing the occupation of selling medicated bitters in quantities of a quart and less than five gallons, without obtaining a license therefor," sufficiently describes an offense under the Revised Penal Code. Otherwise under the law anterior to the revision of the Codes.
2. CHARGE OF THE COURT.— Information charged the offense of pursuing the occupation of selling medicated bitters, etc.; but the trial court instructed the jury that the prosecution was for "selling medicated bitters," etc. *Held*, that the instruction misdirected the jury as to the accusation against the defendants, and was therefore essentially erroneous.

APPEAL from the District Court of Madison. Tried below before the Hon. W. D. WOOD.

The matters involved in the rulings are disclosed in the opinions severally delivered on the motion to dismiss the appeal and on the errors assigned. The jury assessed a fine of $150 against the appellants.

Waul & Walker, for the appellants.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. (On motion to dismiss.) The recognizance entered into by appellants to bring the case to this court set forth the offense of which they stand charged, and for which they have been convicted, as "unlawfully pursuing the occupation of selling medicated bitters in quantities of a quart and less than five gallons, without first obtaining a license therefor."

The assistant attorney general moves to dismiss the appeal because the recognizance describes no offense known to the law; citing in support of the motion *Munch* v. *The State*, 3 Texas Ct. App. 552. *Munch's* case was decided under the act of March 13, 1875, and before the revision of the Codes. Taking the *provisos* of the first section of that act in connection with and as part of the enacting clause, the construction was that the offense consisted in a failure to pay the occupation tax, and not in a failure to obtain license, since by the *proviso* the receipt for the occupation tax was the only license required. In the revision the p ovisos have been separated from the enacting clause, and the statute now defining the offense is as follows: "Any person who shall pursue or follow any occupation or profession, or do any act, taxed by law, without first obtaining license therefor, shall be fined in any sum not less than the amount of the taxes so due and not more than double that sum." Penal Code, art. 110.

Manifestly the offense under this statute is to pursue or follow an occupation without first obtaining a license therefor, and the recognizance we are considering fully states the offense as now defined and declared by the law.

The motion to dismiss the appeal is therefore overruled.

Motion to dismiss overruled.

HURT, J. The appellants were convicted for pursuing the occupation of selling medicated bitters. The court below, in the first paragraph of the charge, instructed the jury as follows:

"W. W. Viser and J. M. Carson stand indicted by information for selling medicated bitters known as the Home Sanitive Cordial in quantities of one quart, and not more than five gallons, without first obtaining a license therefor." Then follows in the charge the plea of not guilty, reasonable doubt and definition of medicated bitters.

In the third paragraph the jury is charged that "if you believe from all of the evidence in this case that the defendants as partners, doing business in the county of Madison as druggists, under the firm-name and style of Viser & Carson, did at any time within one year next before the filing of the information in this case, sell any of the Home Sanitive Cordial, in quantities of one quart and less than five gallons, and you further find from the evidence that said Home Sanitive Cordial, from its composition and ingredients, is, as has been before defined in this charge, what is in substance termed in the law medicated bitters; and that they have sold Home Sanitive Cordial without first having obtained a license so to do, as required by law, in such case, if you so find the facts, the defendants are guilty as charged in the information."

The charge of the court was promptly objected to on the trial. The objections being overruled, the defendants excepted and reserved their bill. But suppose there had been no exceptions to the charge, was not the error of such a character as to require a reversal of the judgment? We think so. In *Haynes* v. *The State*, 2 Texas Ct. App. 84, we find this principle enunciated: "If the rule be subject to any limitation or exception at all in cases of misdemeanor, then the limitation or exception can only arise in those cases where there is such a radical defect in the charge as that it might with propriety be said to amount to no charge as applicable to the particular facts of the case; as, for instance, if the court should, in attempting to define the offense, give the definition of another and totally different one from that with which the defendant was charged; or if, in attempting to declare the penalty, he should announce one totally different from that affixed by statute. In such a case this court should undoubtedly feel authorized, if not bound, to follow the rule in felony cases, so well and forcibly stated in the opinion by our learned chief justice in *Bishop* v. *The State*, 43 Texas, 396."

The rule referred to is that which requires in misdemeanor cases an objection to the charge to be interposed by the defendant. In this case, however, there was an objection to the charge taken at the proper time, and here there is no necessity of drawing support from the principles above enunciated. Let us return to the charge.

At the very outset it announces that which was not true. The defendants were not being "prosecuted for selling medicated bitters," but on the contrary they were on trial for *pursuing* the *occupation* of selling medicated bitters. The elements of this offense consisted of pursuing an occupation which was the selling of medicated bitters. We are not to be understood as intimating that this occupation cannot be pursued in connection with others. Nor is it necessary for more than one sale to be made, if the party is prepared to enter into that pursuit. This charge is legislative in its effects; acts not made penal by the Code are denounced as constituting a crime. Nor does the third clause cure the matter, if indeed it be susceptible of relief. Partners in the drug business may make a single sale of medicated bitters, and yet not be engaged in pursuing that occupation.

For the errors in the charge of the court, the judgment is reversed and the cause remanded.

Reversed and remanded.

E. CURRIE AND ANOTHER *v.* THE STATE.

1. APPEAL IN FORMA PAUPERIS.— From a final judgment for $20 or more, rendered on a recognizance or bail bond, an appeal may be taken or a writ of error sued out *in forma pauperis;* but in such case it is indispensable that the requirements of article 1401 of the Revised Statutes be complied with by making the "strict proof" therein prescribed. Affidavit that the appellant is "unable to give security for the costs of appeal" is not a compliance with those requirements, and is insufficient.
2. SAME.— See the opinion for a collocation of the statutory provisions which regulate appeals and writs of error *in forma pauperis* from judgments on recognizances, bail bonds, and bonds taken for the prevention or suppression of offenses.

APPEAL from the District Court of Houston. Tried below before the Hon. W. D. WOOD.

The opinion discloses the case.

E. Currie, for the appellants.

Thomas Ball, Assistant Attorney General, moved to dismiss the appeal.

WHITE, P. J. This is an appeal from a judgment final on a forfeited bail bond. Judgment final was rendered on the 11th of October, 1879, after the Revised Statutes had gone into operation. When their motion for a new trial was overruled, Currie and Hyde, the sureties on the forfeited bond, gave notice of appeal. No appeal bond has been executed by appellants or either of them, to perfect the appeal. In lieu of an appeal bond Currie, one of the appellants, made the following affidavit: "Personally appeared before the undersigned authority, E. Currie, one of the defendants in the foregoing-stated cause, and after being duly sworn says that he is unable to give security for the costs of appeal in said cause," etc.

The assistant attorney general moves to dismiss the appeal because it is not perfected as the law requires. The motion is well taken.

Our statutes prescribe the mode of procedure as follows: "An appeal may be taken either by the State or defendant from every final judgment rendered upon a recognizance, bail bond, or bond taken for the prevention or suppression of offenses, when such judgment is for twenty dollars or more, exclusive of costs, but not otherwise; and the proceedings in such cases shall be regulated by the same rules which are prescribed in other civil suits." Code Crim. Proc. art. 891.

"Art. 892. The State or the defendant may also have any such judgment as is mentioned in the preceding article, and which may have been rendered in the District or County Court, revised upon writ of error as in other civil suits."

"Art. 893. In the cases provided for in the two preceding articles, the proceedings shall be regulated by the same rules that govern the other civil actions where an appeal is taken or writ of error is sued out."

Turning to our Civil Statutes, we find the rule prescribed as follows: "The appellant or plaintiff in error, as the case may be, shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable costs of the suit of both the appellate and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and pay all the costs which have accrued in the court below, or which may accrue in the appellate court." Rev. Stat. art. 1400. (If a supersedeas is desired, then the bond must be in conformity with Revised Statutes, art. 1404.)

"Art. 1401. When the appellant or plaintiff in error is unable to pay the costs of appeal or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but in order to do so he shall be required to make strict proof of his inability to pay the costs or any part thereof. Such proof shall be made before the county judge of the county where the party resides, or before the court trying the case, and shall consist of the affidavit of said party stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit; whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party, under this act, to his appeal."

"Art. 1402. When the bond, or affidavit in lieu thereof, provided for in the two preceding articles has been filed, and the previous requirements of this chapter complied with, the appeal or writ of error, as the case may be, shall be held to be perfected."

But, with neither a bond nor an affidavit in lieu thereof, such as the statute requires, this court has no authority to do so, and will not entertain the appeal from a judgment on a forfeited bond. Because the appeal has not been perfected, the motion of the assistant attorney general must prevail and the appeal be dismissed.

Appeal dismissed.

BEN HARRISON v. THE STATE.

1. ASSAULTS — PRACTICE.—On trial of an indictment or information for aggravated assault a conviction may yet be had for simple assault, notwithstanding the Revised Penal Code omits the provision of the original Code which expressly authorized such convictions. Pasch. Dig. art. 2152.

2. PRACTICE OF THE COURT OF APPEALS.—On his trial for aggravated assault the defendant asked an instruction on simple assault, but the court below refused it on the theory that a conviction for simple assault could not be had. It being apparent that the ruling may have been prejudicial to the defendant, this court sets aside the conviction notwithstanding no statement of facts appears in the record.

APPEAL from the County Court of De Witt. Tried below before the Hon. O. S. THRELKELD, County Judge.

All material facts appear in the opinion of the court.

Stayton, Lackey & Kleburg, for the appellant.

Thomas Ball, Assistant Attorney General, for the State.

WINKLER, J. In this case three supposed errors are said to have been committed during the progress of the trial below, and are properly presented by bills of exception. In order that these questions may be the better understood it may not be amiss to say that the appellant was prosecuted by information in the County Court, charged with an aggravated assault, and was tried on the plea of not guilty. The court in its instructions to the jury confined the charge to an aggravated assault, and ignored the question of simple assault. A charge was asked on simple assault, but the court refused to give it. After some controversy, hereafter to be noticed, a verdict was returned for an aggravated assault, with a fine of twenty-five dollars; upon which verdict judgment was entered.

The first bill of exceptions recites that the jury brought into court a verdict convicting the accused of a simple assault, and imposing a fine of one dollar. The court refused to receive the verdict, and told the jury they must retire and read the instructions of the court, and sent the jury out for their consideration. The defendant claimed that the verdict should be received and recorded, which was refused by the court and the defendant excepted to the ruling; and afterwards the jury returned into court a verdict of guilty of an aggravated assault, to which the defendant objected, and his objection being overruled by the court he excepted. Taking the matters set out in this bill of exceptions in connection with the charge of the court and the motion for a new trial, it is apparent that the grounds upon which the court acted when the jury first returned into court with a verdict for simple assault was that such a verdict was not warranted by the charge of the court.

The second bill of exceptions discloses the views of the judge as to the law of aggravated assault, and accounts in a measure for his refusal to charge on a simple assault as requested by the defendant's counsel. The defendant had moved for a new trial, which motion had been overruled. We here quote from the bill of exceptions showing the opinion of the court as to the law and the grounds of his action, to wit: "That the legislature in adopting the Revised Code had evidently intended that there should be no grade to aggravated assault, by not inserting the provision of the old law, wherein it was provided that upon an indictment for aggravated assault the jury may find the defendant guilty of simple assault, and by reducing the minimum fine to twenty-five dollars instead of one hundred." In other words, it seems to have been the opinion of the court that by the law as it now stands, one prosecuted for an aggravated assault could not under such a charge be convicted of a simple assault, and that it would be error to so charge the jury.

The defendant called in question the correctness of the proceedings by motion in arrest of judgment. The motion was overruled, and the ruling of the court on this motion is the subject of the third bill of exceptions.

It must be conceded that by the letter of the statute it is not declared in so many words that there are grades or degrees in the offense of aggravated assault, but the practice under statutes quite similar, and in many instances precisely identical with those now in force, treats the subject as matter of evidence, grading the offense and the measure of punishment by the proofs adduced. The Code defines assaults and assaults and batteries, and, without giving any express definition of aggravated assaults, declares in general terms that "an assault or battery becomes aggravated when committed under any of the following circumstances," and following with ten separate circumstances, wherein an assault or battery would, under these provisions, become aggravated. It has likewise been the practice, under the provisions of the statutes formerly in force,—and the rule seems to us to be equally applicable to those now in force,—to indict for an aggravated assault or assault and battery, and regulate both the charge and the punishment by the evidence.

We are of opinion there is no such alteration or modification of the law made by the Revised Statutes as would warrant or require any material change in the practice as it was established and settled prior to the revision. The practice as it was formerly was doubtless well understood by those who took part in the revision, and it is but fair to presume that, if a change was intended by the revision, such intention would have been expressed in some unambiguous language. We are of opinion, therefore, that one indicted or informed against for an aggravated assault can, under the laws now in force, be legally convicted either of the offense charged or of a simple assault or assault and battery, according as the testimony shall warrant. We are further of opinion that in a proper case the judge should charge on simple assault. Whether a charge even on aggravated assault should be given, or not, would depend upon the proofs adduced on the trial, and so as to a simple assault. Inasmuch, therefore, as the judge refused to charge on simple assault in the present case, on what we deem an erroneous construction of the law, we are of opinion there was error in refusing a charge on simple assault, on the grounds upon which the refusal rested. The propriety of giving or refusing the charge is governed by a different rule entirely. If the evidence warranted the charge it should have been given, but if not, then the charge should have been refused.

The maximum punishment for a simple assault, or for assault and battery unattended by circumstances of aggravation, is the same as the minimum punishment for an aggravated assault or battery. Penal Code, arts. 495–498.

We are unable to perceive that any material error, calculated to prejudice the rights of the defendant, was committed by the action of the court in refusing to receive the first verdict offered by the jury. There being no statement of facts, we cannot say the case required a charge on simple assault. The charge was confined to an aggravated assault; the verdict was not warranted by the charge of the court, being for simple assault. We make no ruling on this branch of the case as now before us. But, from the fact that the defendant was tried under what we deem an erroneous view of the law, and one likely to have injured the defendant, the judgment should be reversed and the case remanded that a trial may be had under what in our opinion is a proper construction of the law. Having taken this view of the case it is not necessary that we discuss any other matters at present arising in the case. The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

H. S. DREYER *v.* THE STATE.

SLAUGHTERED ANIMALS — FAILURE OF BUTCHERS TO REPORT.— Article 756, Penal Code, by which any butcher failing to report the animals he slaughtered is subject to fine, defines a substantive offense, not limited by or dependent on any other enactment, and is a general law in force throughout the State. There is no repugnancy between it and article 4565 of the Civil Statutes, which shows the kind of a report required of butchers under the penalty prescribed by said article 756.

APPEAL from the County Court of Nueces. Tried below before the Hon. C. L. LEGE, County Judge.

The case is clearly stated in the opinion of the court.

No brief for the appellant.

Thomas Ball, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was prosecuted by indictment and was convicted for a violation of the provisions of art. 756 of the Revised Penal Code, which reads: "If any person engaged in the slaughter and sale of animals for market in any county, city, town or village in this State shall fail to report to the Commissioners' Court of the county in which he transacts such business, at each regular term thereof, the number, color, age, sex, marks and brands of every animal slaughtered by him since the last term of said court, accompanied with a bill of sale or written conveyance to him for every animal slaughtered, save such as were raised by himself, which shall be specified, he shall be punished by fine not less than fifty nor more than three hundred dollars."

This article defines a distinct, substantive offense, and affixes a punishment to the same, and is by no means dependent upon or connected with other portions of the Penal or Civil Statutes relating to the same subject matter.

It is a re-enactment of a portion of the act of 1866, "to regulate the sale, etc., of animals, and to require butchers to report to the police court," etc.; which latter act, or that portion of it, had apparently been repealed by subsequent legislation. *Monroe* v. *The State*, 3 Texas Ct. App. 341. Nor is there any inconsistency or repugnancy between the article above quoted and art. 4565 of the Revised Statutes. On the contrary, this latter civil statute simply provides that butchers shall make the report a failure to make which is punished by art. 756, Penal Code, *supra*.

As above stated, art. 756 of the Penal Code is a substantive and distinct offense, and one which applies now with equal force to all portions of the State, and its operation is in no manner limited or controlled by the "Stock Laws" found in title XCIII, ch. 5, Revised Statutes.

If any error was committed in the rulings or in the charge of the court, they are not of so fundamental a character as to require our notice,— the case being a misdemeanor and the defendant having failed to take advantage of such error by proper bills of exception saved on the trial.

The judgment of the County Court is affirmed.

Affirmed.

A. E. McDOW *v.* THE STATE.

1. CONTINUANCE — POSTPONEMENT — NEW TRIAL.— The day next before the trial of a theft case the defendant sued out a subpœna for two witnesses, and it was served on them the same day. When called for trial he moved for a continuance or a postponement on account of the non-attendance of one of them and the inebriety of the other. The trial court, after offering to attach the absent witness and holding the other to be sober enough to testify, overruled the motion, and the defendant was forced to proceed, and was convicted on evidence chiefly circumstantial. See the opinion *in extenso* for

all the reasons on which it is *held* that the court below should have either sustained the motion or have granted a new trial.

2. Practice — Bill of Exceptions.— The Code of Procedure, article 686, provides for the allowance of bills of exception in criminal actions, and requires the judge's signature thereto, "under the rules prescribed in civil suits." Note in the opinion the collocation of new regulations adopted in the revision of the Civil Statutes, and which are also applicable to criminal cases.

Appeal from the District Court of Fayette. Tried below before the Hon. L. W. Moore.

Appellant was convicted of cattle-theft, and a term of two years in the penitentiary was assessed as his punishment. The opinion discloses everything relevant to the rulings.

Phelps & Haidusek, for the appellant.

Thomas Ball. Assistant Attorney General, for the State.

Winkler, J. This case was called for trial in the court below December 1, 1880. Counsel representing the State announcing ready, the defendant applied to the court, by affidavit, for a continuance of the case until the next term, or, in the event a continuance should be refused, that the trial be postponed to some future day of the then present term, on account of the absence of two witnesses, to wit: William Gates and Mrs. S. A. McDow, the mother of the defendant. The testimony expected to be elicited from these witnesses is set out in the defendant's affidavit. It is stated that the witnesses resided in Fayette county, and had been regularly subpœnaed as witnesses in the case. Otherwise, the formal averments in the affidavit for a continuance or postponement appear to be full and complete. By the exhibits attached, one of which is the subpœna for the witnesses and the officer's return thereon, it is shown that the witnesses had been served on

November 30, 1880, and, with special reference to the witness Mrs. McDow, it is stated in the affidavit that she is absent "because she has a child very sick at home, and that she cannot leave her sick child, which demands her constant care and attention." In support of this averment there is appended as an exhibit to the affidavit the following written statement of Mrs. McDow, dated December 1, 1880: "My little daughter is sick in bed, has been for several days, and it is impossible for me to leave her, as I have no one to leave with her."

The application having been heard, it was overruled, and the trial was ordered to proceed. The defendant excepted to the ruling, and the judge, in explanation of his ruling, appends to the bill of exceptions, among other things, the following statement: "When the application for continuance was presented, which was about 11 o'clock, A. M., the court overruled the same, saying, if it was the wish of counsel for defendant, said witness (Mrs. McDow), who lives some seven miles distant, would at once be sent for, attached, and brought before the court in time to testify. The proposition was not accepted by counsel, nor did they ask for said attachment till 2 o'clock, P. M., which was then ordered and said witness attached, and was brought to the court-house, not until the argument was closed. As to the witness Gates, he was present, and in the judgment of the court sufficiently sober to testify, as will appear in a separate bill of exceptions."

In a subsequent bill of exceptions it is perceived that, the case being on trial and the defendant having introduced such witnesses as were present in court, stated that he could not further proceed with the trial unless the witness Gates, who was then in a state of intoxication, was in a condition to testify. The court ordered the witness to be brought into court, and he was interrogated by defendant's counsel privately, and they announced to the court that said witness, by reason of his being intoxicated, was not in condition to testify, and again asked the court to postpone the further trial of the cause. The court then caused the witness to be sworn, and after asking him a few questions which the bill states "were answered in a maudlin, drunken manner," ordered counsel to proceed with the examination of the witness, which defendant's counsel declined to do on account of his intoxicated condition. Thereupon the court ordered the cause to be "given to the jury upon argument of counsel." The judge, when asked to sign a bill of exceptions to the ruling, appended the following qualifications and explanations: "The said witness Gates was drunk in the morning of the trial; the court ordered him placed in jail, to be confined until sober enough to testify. When the defense closed their testimony in the evening the court had the witness brought into court, and examined him to discover his condition. His answers showed him capable and sufficiently sober to testify, and the court so adjudged. The defense refused to ask him any questions or in any manner to test his ability to give his testimony." This explanatory statement of the matter is signed by the judge presiding, and is followed by the following statement which is also signed by the judge: "Upon presenting to counsel for defendant the above qualifications to this their bill of exceptions, they refused the same, and gave notice they would proceed under the statute to procure the signature of bystanders. It will be observed this bill of exceptions pretends to give only the opinion of counsel, tried privately out of court, as to the condition of the witness Gates; and this bill of exceptions, with the qualifications and explanations, is made out by the court and signed as the bill of exceptions." There also appears from the transcript of the record the bill of exceptions above referred to as first presented to the judge for his signature, leaving out of view the explanations and qualifications of the judge, with the following certificate appended: "We, the undersigned citizens of said state and county, who served as jurors in the above entitled and numbered cause, hereby certify that the foregoing bill of exceptions is correct and presents a true statement of the facts as they occurred in our presence, as well as the condition of the witness William Gates." This certificate purports to have been signed by three members of the jury. To this is appended the following by the judge, giving his reasons for withholding his signature to the bill: "The foregoing is a copy of the bill of exceptions which was refused by the court. As the court had amended the original bill, and adopted the same with amendments, his refusal to sign said original is therefore indorsed on this copy, which is to be considered the original,"— Marked "Refused," and signed by the judge.

Following next in the order of proceeding is the following affidavit of three affiants, omitting formal portions where their names are set out: "That they saw the witness William Gates when he was brought into court and sworn as a witness in said cause, and heard the questions put to him by the district judge, and his answers thereto; that from his actions and answers they were satisfied that the said witness William Gates was so much intoxicated as to render him entirely incompetent to testify in an intelligent manner at said time." We have deemed it proper to set out so much of the record in order that our conclusions and rulings may be understood. It should also be noticed in this connection that there is appended to the defendant's motion for a new trial an affidavit of the witness Gates, in which he states that when the case was tried he was "under the influence of liquor; that he does not recollect being called as a witness in said cause, nor does he recollect being sworn and examined by the judge presiding as to his condition; that he had been under the influence of liquor the day prior to said trial as well as on the day of trial, and knows nothing about what transpired in said court during said trial or while he, affiant, was in said court-house upon the witness stand, except what has been told him by others since the close of said trial." We propose to consider, as the most important features of the case, the question of continuance and the ruling of the court on the motion for a new trial, in connection with certain provisions of law as found in the Revised Code of Criminal Procedure, and incidentally certain questions of practice under the same Code.

Article 560 prescribes what the defendant, in a first application for a continuance on account of the absence of a witness, must do in order to obtain it. He must state under oath, 1, the name of the witness, and his residence if known, or that his residence is not known; 2, the diligence which has been used to procure his attendance, and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpœna, in cases where the law authorizes the issuance of an attachment; 3, the facts which are expected to be proved by the witness, and it must appear to the court that they are material; 4, that the witness is not absent by the procurement or consent of the defendant; 5, that the application is not made for delay; 6, that there is no reasonable expectation that the attendance of the witness can be secured during the present term of the court by a postponement of the trial to some future day of said term. And it is declared that the truth of the first or any subsequent application, as well as the merit of the grounds set forth therein and its sufficiency, shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. To this is annexed the following proviso, to wit: "*provided*, that, should an application for a continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued for the term, or postponed to a future day of the same term." Art. 560, subdivision 6.

On the question of diligence it is seen in subdivision 2, above, that it is not sufficient diligence to have caused to be issued, or to have applied for, a subpoena in cases where the law authorizes the issuance of an attachment. In this connection the Code defines when an attachment may issue to compel the attendance of a witness in a criminal action or proceeding. When the witness resides out of the county in which the prosecution is pending, it is provided that "the defendant shall be entitled, on application either in term time or in vacation, to the proper clerk or magistrate, to have an attachment issued to compel the attendance of such witness. The application for an attachment under these circumstances "shall be in writing and under oath, shall state the name of the witness and the county of his residence, and that his testimony is material to the defense." The State shall also be entitled to attachments under the provisions of the same article, upon the written application of the attorney representing the State, and the statute requires that such application "shall state the name and residence of the witness, and that his testimony is believed to be material for the State." In cases provided for in article 489, it is not required that there should be a disobedience of a subpœna by the witness before the issuance of the attachment. On the contrary, the attachment may be issued in the first instance. "When a witness who resides in the county of the prosecution has been duly served with subpœna to appear and testify in any criminal proceeding *fails to so appear,* either the State or the defendant shall be entitled to have an attachment issued forthwith for such witness." Art. 488. The differences in the circumstances under which a witness may be attached when residing in the county of the prosecution, or when residing out of the county where the prosecution is pending, are clearly indicated in these two articles of the Code.

The provisions of article 488 apply to the witnesses for whom the continuance in the case under consideration was sought, it being alleged in the affidavit that they reside in the county of the prosecution. It is said that they had been duly served with subpœna and had failed to appear. In this state of case an attachment could properly have issued, they being within the meaning and intent of subdivision 2 of art. 560; in which case an attachment for the witness would be allowable. In the present case the witnesses had been subpœnaed, but no attachment had been issued or applied for, at the time the continuance or postponement was applied for. Nor was it necessary. It is not shown that either of the witnesses had, up to the time of the making the application, refused to obey the subpœna; on the contrary, it very clearly appears that the witness Gates was in the custody of John Barleycorn, but in attendance on the court, too much intoxicated to appear in court, and was placed in custody by the judge until he became sufficiently sobered off to give his testimony; and as to the witness Mrs. McDow, it is shown that she was not in attendance, but was confined at home in the necessary attendance upon a sick child. We know of no rule of law by which the showing or excuse of the witness for non-attendance would of itself be sufficient. It is one of those extraordinary cases which sometimes arise, and which seems not to be within the language of the statute. If the witness had been proceeded against for failing to obey the subpœna, under the provisions of the Code, article 480 and following, then it would have been within the discretion of the court to judge of the sufficiency of an excuse rendered by the witness (art. 485); but this is not the question under consideration. The question is not whether a fine against the witness should have been imposed; or, having been imposed, shall be perpetuated in whole or in part, or remitted altogether; but it is this, Was the court required in the first instance, in the exercise of a sound discretion confided in it by subdivision 6 of article 560, to grant either the continuance or the postponement asked by the defendant, or should the court, in the second place, have granted a new trial after hearing the testimony of the witnesses who were present and who had testified?

In determining these questions it is well to observe the length of time intervening between the date of the application, so far as a postponement is concerned, and the time of the adjournment of the court for the term. The application was made on December 1, 1880; the court, agreeably to the caption of the transcript, adjourned on December 14, 1880. Leaving out of the estimate both the day the application was made and the day of adjournment, twelve days remain. This, we are of opinion, was a sufficient time for the witness Gates to have sufficiently recovered from his intoxication to have testified understandingly, and for the child of Mrs. McDow to have recovered, or to have enabled the mother to have procured some person to take care of it while she attended the trial.

The Code, art. 568, provides for such a course in the following language: "A continuance may be granted on the application of the State or the defendant after the trial has commenced, when it is made to appear to the satisfaction of the court that, by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had; or the trial may be postponed to a subsequent day of the term." Code Crim. Proc. art. 568. And on the same subject

Mr. Wharton says: "When the court is satisfied that a witness is so drunk as to be unable to testify, he may be excluded or his examination postponed until he is sober," — citing several authorities. Wharton's Crim. Ev. § 384, *a*. Under a reasonable application of these authorities, we are of opinion that, in view of all the circumstances surrounding the defendant at the time the application was presented, the ends of justice and the rights of the defendant to a full and fair trial under the law required of the court either a postponement of the trial (which, in our opinion, would have been most proper), or else he should have granted the continuance. So that, whilst the matter was confided to the sound discretion of the court, we cannot give our entire concurrence to the manner of its exercise in the present case; on the contrary, we are of opinion the action of the court was not only erroneous, but, in view of the fact that much of the testimony is circumstantial, we believe that the error was prejudicial to the rights of the defendant. This is to us apparent when reviewing the whole of the evidence adduced, and which it became incumbent on the court below to do, in considering the motion for a new trial, under the proviso of subdivision 6 of article 560, set out above; and especially as the testimony sought to be obtained from the absent witnesses, as set out in the application, was, it seems to us, of a material character, and there being nothing in the record to indicate that the facts were not probably true. It is true that in some particulars the testimony expected from the absent witnesses was cumulative of testimony adduced; but, in a case of felony when the main inculpatory facts are to be proved by circumstances, the defendant should have the benefit of all legal testimony at hand which tended to explain or controvert the testimony against him.

It is urged against the charge of the court that in some of its paragraphs it tends to assume that certain facts have been proved, which, it is contended, invaded the province of the jury, and was upon the weight of the evidence. It is not deemed necessary in the present case to do more than invite the attention of the judge below to those matters, so that on a future trial the proper corrections, if any be found necessary, may be made, and the charge be so modified as to avoid a like controversy.

In the matter of practice in reserving bills of exception to any action or ruling of the court, we understand the rule to be as follows: On the trial of any criminal action the defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court, or other proceedings in the case, and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits. The object to be attained in reserving a bill of exceptions is that the matter excepted to may be revised on appeal. Bills of exception in civil suits are provided for, and the rules in relation thereto are found in the Revised Civil Statutes, from art. 1358 to art. 1367, inclusive. The following articles, as well perhaps as others, apply as well to criminal cases: "Art. 1363. It shall be the duty of the party taking any bill of exceptions to reduce the same to writing, and present the same to the judge for his allowance and signature, during the term and within ten days after the conclusion of the trial.

"Art. 1364. It shall be the duty of the judge to submit such bill of exceptions to the adverse party or his counsel, if in attendance upon the court, and if the same is found to be correct, it shall be signed by the judge without delay, and filed with the clerk during the term.

"Art. 1365. Should the judge find such bill of exceptions to be incorrect, he shall suggest to the party or his counsel who drew it, such corrections as he may deem necessary therein, and if they are agreed to he shall make such corrections and sign the same, and file it as provided in the preceding article.

"Art. 1366. Should the party not agree to such corrections, the judge shall return the bill of exceptions to him with his refusal indorsed thereon, and shall make out and sign, and file with the clerk, such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred.

"Art. 1367. Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding article, he may, upon procuring the signatures of three respectable bystanders, citizens of this State, attesting the correctness of the bill of exceptions as presented by him, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto."

There seems to have been no material departure from these rules, though it does not appear that there was much attention paid to them, as we find the matter set out in the transcript. Still, with reference to the future, we have deemed it not amiss to call attention to the changes in the law by the revision of the Code. From our conclusions with reference to the question of postponement, we deem it unnecessary to discuss the facts or any other matter presented. Because of error in forcing a trial in the absence of the defendant's witnesses, we are of opinion the judgment should be reversed and a new trial awarded the appellant; and it is so ordered.

Reversed and remanded.

ABE ROUNTREE *v.* THE STATE.

1. MALICIOUS MISCHIEF — INDICTMENT.— An indictment which charges the wounding of the animal to have been either wilful or wanton sufficiently charges an offense under article 680 of the Revised Penal Code. But such indictment would not have been good under the old law. Under that law the wounding must have been charged as both wilful and wanton.
2. SAME — CASE STATED — ARREST OF JUDGMENT.— The indictment charged the wilful wounding of a cow on November 1, 1879, but the proof showed that the offense, if committed at all, was committed on the last day of June or first of July, and before the Revised Statutes took effect. The defendant assailed the indictment as insufficient with reference to the old law, by motion in arrest of judgment. *Held*, that, as the indictment was sufficient to charge the offense under the present law, the court did not err in overruling the motion in arrest. See opinion for rule laid down.
3. SAME — EVIDENCE — PRACTICE.— Objection to the evidence of the date of the commission of the offense should have been made at the time it was offered, or a subsequent motion to strike it out, and if overruled, might have been good ground for a motion in arrest of judgment because it had not been legally rendered against the defendant.
4. CHARGE OF THE COURT — PRINCIPAL OFFENDERS.— In order to hold a person liable with others as a principal in the commission of an offense, there must be a combination of both act and intent. See the opinion for a charge on the question *held* to be erroneous.

APPEAL from the County Court of Walker. Tried below before the Hon. J. S. BESSER, County Judge.

The opinion sufficiently discloses the case.

Abercrombie & Randolph, for the appellant

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The charge in the indictment is, that the defendant, "on the first day of November, in the year of our Lord eighteen hundred and seventy-nine, did, then and there, wilfully wound a cow, then and there the property of Thomas J. Green," etc. Under art. 680, Penal Code, the indictment is good, the language in the statute being: "If any person shall *wilfully* OR *wantonly* . . . wound . . . any animal," etc.

But the evidence adduced on the trial showed that the offense, instead of having been committed, as alleged, on the 1st of November, 1879, which was after the Revised Penal Code went into effect, was, in fact, committed, if at all, the last of June or first of July, 1879, and before the adoption of the Revised Code. This being the case, the indictment would not have been good under the old law, because it failed to allege, in the language of the statute as it then read, that the injury to the animal was inflicted both "*wilfully* AND *wantonly.*" Pasch. Dig. art. 2345; *The State* v. *Rector,* 34 Texas, 565; *Branch* v. *The State,* 41 Texas, 622.

Defendant has attempted to avail himself of the insufficiency of the indictment with reference to the old law by a motion in arrest of judgment, which was overruled by the court. The court did not err in overruling the motion, because the indictment on its face was good and sufficient under the new law, and the statutory rule is, that such motion "shall only be granted upon any ground which would be good upon exception to an indictment or information for any substantial defect therein." Code Crim. Proc. art. 787.

Had the defendant objected to the evidence as to the date of the commission of the offense, at the time it was offered; or had he moved the court, subsequently, to strike it out or exclude it, we think either motion should have been sustained. Had the court declined to sustain such motion, then, doubtless, such refusal might have been urged in a motion in arrest of the judgment, because it had not legally been rendered against him. Code Crim. Proc. art. 785. As submitted in the record, the motion in arrest does not present the question in a manner that it can be availed of.

The evidence shows that in so far as this defendant was concerned, if he participated at all in the commission of the offense, it was by aiding and assisting one Mills, who was the actual perpetrator. In quite a voluminous charge the court instructed the jury, among other things, as follows, viz.: "The law also presumes the intent when the act is perpetrated, and it devolves upon the accused to prove their innocence, or that the act was committed through accident. When an offense is committed by one person, others being present and aiding by their acts, or giving countenance to the perpetration of the same to those actually engaged in the commission of the unlawful act, are held as principal offenders, and may be prosecuted and convicted as such."

The rule of law is that, to hold a person liable as a principal with others in the commission of an offense, there must be a combination of both act and intent. Penal Code, art. 75; *Welsh* v. *The State*, 3 Texas Ct. App. 413. The charge was excepted to, and special charges were asked, which were refused,—some of which should have been given in substance if not in the language as used. The law embraced in them was not covered by the general charge.

For error in the charge of the court, the judgment is reversed and cause remanded.

Reversed and remanded.

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Joe Scott *v.* The State.

Charge of the Court — Practice.— Whether asked or not, the court must, in felony cases, by a proper charge apply the law to every conclusion legitimately deducible from the evidence. If there is any evidence tending to establish a defense, the defendant is entitled to a charge directly upon the point, no matter what may be the view of the court on the weight and value of the testimony; and a charge composed of statutory definitions generally applied will not suffice.

APPEAL from the District Court of Bastrop. Tried below before the Hon. L. W. MOORE.

The opinion sufficiently states the case.

Joe Scott, in *propria persona.*

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. When appellant traded the horse to Benson, at Williams' ranche, in Hays county, he told Benson that he had bought the gelding from a negro, on Walnut creek, in Bastrop county, who had partly raised the gelding. The charge of the court was a general enunciation of the law of theft; and if the name of Allen Shelton, the alleged owner, as mentioned in the first paragraph were omitted, the charge would suit as well to any other case of horse-stealing as the one the court was trying. There was no attempt to make any application of the law to the facts.

The rule is that the court, in felony cases, must apply the law by a proper charge to every conclusion deducible from the evidence, whether asked or not. If there is any evidence tending, though slightly, to establish a defense, the defendant is entitled to a charge directly upon that point, no matter what view the court may entertain of the weight and value of the testimony; and a charge composed of statutory definitions generally applied will not suffice. *Heath* v. *The State,* 7 Texas Ct. App. 464; *Vincent* v. *The State,* 9 Texas Ct. App. 303; *Whaley* v. *The State,* 9 Texas Ct. App. 305.

Other questions raised will not arise on a new trial and are therefore not noticed. Because the charge was insufficient in its presentation and application of the law to the facts of the case, the judgment is reversed and the cause remanded.

Reversed and remanded.

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BUD WILLIAMS *v.* THE STATE.

1. THEFT — CONTINUANCE.— An application for a continuance to secure witnesses to prove the purchase of an animal alleged to have been stolen should show where the alleged purchase was made with more particularity than on "the west side of the T. river," and with more certainty as to time than "in the spring or summer of 1880."
2. SAME.— An application for continuance on account of absent witnesses is defective if it fails to show whether or not the subpœnas had been served, or whether diligence to secure service had been practiced; and is also defective if it does not show that they were issued by the proper authority.
3. SAME.— Since the Revised Statutes have gone into effect, the granting of even a first continuance is confided to the discretion of the trial court.
4. SAME — NEW TRIAL.— Unless it appears upon the trial that the desired evidence was of a material character, and that the facts set forth in the application were probably true, a new trial should not be granted on account of the refusal of a continuance. See the opinion for rulings of the court below, *held* correct under these rules.

APPEAL from the District Court of Dallas. Tried below before the Hon. G. N. ALDREDGE.

The appellant was indicted for theft of a horse in Dallas county, May 29, 1880, the property of W. T. Wilson. He was tried at the October term, 1880, of the District Court of Dallas county, found guilty by the jury, and his punishment assessed at ten years in the penitentiary.

The State proved the taking of the animal from the possession of the owner, in Navarro county, without his consent, and his subsequent discovery in the possession of defendant in Dallas, who sold and guaranteed the title to the purchaser. The opinion fully discloses the issue submitted on appeal.

No brief for the appellant has reached the hands of the reporters.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. The defendant applied for a continuance, for want of the testimony of George Howell, John H. Johnson, and Green Moore, alleged to reside in Dallas county. The testimony expected from these witnesses is set out in defendant's affidavit as follows: "That he expects to prove by each of said witnesses that they were present on the west side of the Trinity river and saw the defendant buy the horse that he is indicted for the theft of, some time in the spring or summer of 1880; that what he expects to prove by said witnesses is true." The diligence or the want of diligence, employed in order to procure their attendance, is stated thus: "That he has been confined in the jail of Dallas county, without counsel, until this morning; that as soon as the court appointed him counsel he procured subpœnas to issue for said witnesses, and delivered them to Benjamin F. Jones, sheriff of Dallas county, on the 8th day of November, 1880." The court refused the application, and the defendant took a bill of exceptions to the ruling. The refusal of the application for a continuance is also made one of the grounds in a motion for a new trial. The offense is charged to have been committed in Dallas county on May 29, 1880.

The application is evasive and indefinite. The testimony which, it is said, is expected to be elicited from the witnesses, and which the defendant swears to be true, might be material or not, but the application should show where the alleged purchase was made with more particularity than that it was made "on the west side of the Trinity river," and with more certainty as to time than "some time in the spring or summer of 1880." Again, the application does not show whether the subpœnas had been served or not, or that any further effort was made than to cause the subpœnas to be issued and placed in the hands of the sheriff; and even this is not verified by the production of the subpœnas. For aught that appears to the contrary, the subpœnas mentioned may have been issued by the mayor of the city or any other unauthorized official or individual, or even by a fellow-prisoner in the county jail, and that for this reason the sheriff paid no attention to them whatever. Since the change made in previous laws by the Revised Codes, even a first application for a continuance is addressed to the sound discretion of the court to whom it is made; but, if the application be refused and the defendant be convicted, and it appears on the trial that the evidence of the witness or witnesses named in the application was, 1, of a material character, and, 2, that the facts set forth in the application were probably true, a new trial should be granted. Code Crim. Proc. art. 560; *Reynolds* v. *The State,* 7 Texas Ct. App. 516; *Howard* v. *The State,* 8 Texas Ct. App. 53.

If, however, after the whole testimony has been heard, and if, on reviewing the testimony sought to be elicited from the absent witnesses, with reference to its probable bearing on the case, in connection with the other evidence, it should appear to the court either that the testimony was not material, or that it was not probably true, then a new trial on that account should be refused.

In considering the testimony set out in the application, in connection with the other testimony adduced on the trial, we are of opinion that there was sufficient grounds to believe that the statements of the defendant as to what he expected to prove by the absent witnesses were not probably true; and hence we conclude that there was no error in refusing the application for a continuance in the first instance, or in overruling the motion for a new trial. There is no other subject mentioned in the case which requires special notice, and finding no error, the judgment is affirmed.

Affirmed.

HENRY SHUMAKER *v.* THE STATE.

CUMULATIVE SENTENCES.—If, upon the conviction of the same defendant at the same term of court for more than one offense, the punishment assessed in each conviction be confinement in the penitentiary, judgment and sentence shall be rendered and pronounced in each case as though there had been but that one conviction, but the judgment in the second or a subsequent conviction shall be that the punishment shall begin only when that adjudged in the preceding case has ceased to operate. The rule laid down in *Prince* v. *The State*, 44 Texas, 480, has been superseded by the Revised Code of Criminal Procedure, art. 800.

APPEAL from the District Court of Dallas. Tried below before the Hon. G. N. ALDREDGE.

The conviction was for the theft of a horse, and the punishment assessed by the jury was fifteen years in the penitentiary. The opinion discloses the single question involved in the appeal.

No brief for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. In *Prince* v. *The State*, decided in 1876 [44 Texas, 480], it was held that under the Code there is no authority in the District Court to fix the commencement of a term in the penitentiary at the expiration of another term, and that the term of punishment must begin from the date of the sentence. The ruling in Prince's case is no longer the law in Texas. Since that case was decided, the statute law has been changed, and now is that, "where the same defendant has been convicted in two or more cases at the same term of the court, and the punishment assessed in each case is confinement in the penitentiary for a term of years, judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding conviction has ceased to operate, and the sentence and execution thereof shall be accordingly." Revised Code Crim. Proc. art. 800.

Under this provision of the Code it was competent and proper for the judge to direct that the sentence in this case should commence to run when the sentence in a former case tried at the same term of the court had ceased to operate. This appeal is apparently from the sentence; at any rate not until after the sentence had been pronounced. There was no motion for a new trial, nor is there in the transcript any statement of facts or bill of exceptions. No errors have been assigned, and none are perceived on a careful examination of the record. The judgment of the District Court is affirmed.

Affirmed.

WYATT LUNSFORD *v.* THE STATE.

APPEAL—ESCAPE—JURISDICTION OF THIS COURT.—If, after conviction, and pending the disposition of his appeal to this court, the accused effects his escape, this court is ousted of jurisdiction of such appeal, and jurisdiction can be re-invested only by the voluntary return and surrender of the accused within ten days.

APPEAL from the District Court of Lampasas. Tried below before the Hon. W. A. BLACKBURN.

Mathews & Walker, and *W. E. Adkins*, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of felony, to wit, the theft of cattle, from which judgment he appeals to this court. Pending his appeal, he made his escape from custody, but was recaptured the same day. The assistant attorney general, being notified of the escape, moves this court to dismiss the appeal. Art. 837, Code Crim. Proc., provides, that "a defendant in any criminal action, upon conviction, has the right of appeal under the rules hereinafter prescribed." One of the rules prescribed is found in art. 845, and is as follows: "In case the defendant, pending an appeal in a felony case, shall make his escape from custody, the jurisdiction of the Court of Appeals no longer attaches in the case, and upon the fact of such escape being made to appear, the court shall, on motion of the attorney general, or attorney representing the State, dismiss the appeal; but the order dismissing the appeal shall be set aside if it shall be made to appear that the accused had voluntarily returned into custody of the officer from whom he escaped, within ten days." This is the first case arising under the Code Crim. Proc., as amended or changed, calling for a construction. We hold, that under this rule prescribing the defendant's right to appeal, the jurisdiction of the Court of Appeals, although having once attached, was lost by the escape; that the jurisdiction of this court ceased to attach upon the escape of the appellant. And in order for it to re-attach, the appellant must voluntarily return into custody within ten days. The State would not be required to wait the expiration of the ten days before making an effort to capture the prisoner, the presumption being that the prisoner, having escaped, would not voluntarily return into custody. Holding that the escape, *ipso facto*, ousted this court of the jurisdiction of the appeal, and that nothing save a voluntary return to custody could re-invest the court with jurisdiction, we conclude that the motion of the assistant attorney general is well taken.

The appeal is therefore dismissed.

Appeal dismissed.

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Aaron Stephens *v.* The State.

1. Statement of Facts — Practice. — The trial judge at any time during the term of court, whilst in control of the record, is authorized, upon a proper representation that an error of omission or commission appears in the statement of facts, to correct the same according to the truth of the matter.
2. Same. — After the statement has been agreed to, certified and filed, such correction should never be made except in most palpable cases of error, or upon the most satisfactory proof of the same. See the opinion for an instance wherein the court did not err in making the addenda complained of.
3. Charge of the Court — Weight of Evidence. — A charge of the court that in effect instructs the jury that they must not look to other evidence in the case if they believe the testimony of a witness to certain confessions of the defendant, is erroneous as being directly upon the weight of evidence. See the opinion *in extenso* on the subject.

Appeal from the District Court of Anderson. Tried below before the Hon. P. F. Edwards.

The indictment charged the theft, on the 22d day of November, 1879, in Anderson county, of one hundred and thirty dollars in bills of various denominations, current money of the United States, the property of J. S. Sandifer. Upon his trial the defendant was found guilty by the jury, and the punishment assessed was a four years' term in the penitentiary.

The substance of the testimony was that the defendant was employed by Sandifer to assist him repair a privy on the latter's premises. When the two commenced work, Sandifer hung his coat, in the pocket of which was his pocket-book containing the money alleged to have been stolen, on a plank some three or four feet distant from the privy. The defendant worked on that side of the privy and near the coat, and Sandifer worked on the opposite side, and while at work could not see the defendant. At one time while at work, Sandifer went a short distance from the privy to get a plank. The two were at work some fifteen or twenty minutes, and the defendant left the privy between one and five minutes before Sandifer quit work and went in to dinner. Sandifer did not notice the direction in which the defendant went.

Within five minutes after entering the house Sandifer remembered having left his coat where he hung it, and returned for it, and found his coat where he had hung it, but the pocket-book and money were missing. He found, on the ground under his coat, a paper that he had left in his coat pocket. The witness, Sandifer, when he returned for his coat saw a negro woman pass through the back gate of his yard, with a bucket of water, going to a negro-house some thirty feet distant, and passing within ten feet of where the coat was hanging; but she did not stop. The privy stood in an open lot through which persons were in the habit of passing in going to and from dinner, but he saw no one pass when himself and defendant were at work or between the time defendant left and he returned for his coat and money.

William Barbour testified substantially that, a short time after the theft of the money, Sandifer told him who he suspected, and proposed to witness to pay him $25 if he would put him on the track of its recovery. Some two or three weeks after this conversation with Sandifer, defendant handed witness a twenty-dollar bill and asked him to get it changed. Witness took the money into a neighboring store and purchased twenty-five cents worth of tobacco, receiving $19.75 in change. The defendant then instructed witness to give the change to Ann Godfy, to keep for him. The witness remarked to the defendant, "You seem to be rising," and defendant answered, "People say I am building houses and buying land with Sandifer's money." Witness asked, "Do they?" and defendant replied, "Yes, but they can't prove anything, and besides they can't hurt me any how; I didn't take it out of the pocket, but picked it up off of the ground under the coat." Witness asked, "Where is the pocket-book?" and he replied, "Oh! that's gone to h—l long ago, and that will never be a witness against me."

Subsequent to the defendant's first arrest and discharge, the witness, according to his testimony, had another conversation with defendant, during the course of which the defendant said to him that Sandifer had visited him in jail during his confinement, and, telling him that he knew some of the money had been spent, proposed to defendant that if he would return $75, he would be satisfied. Defendant then asked witness if he thought Sandifer would have carried out the proposition. The witness replied in the affirmative, and defendant said, "By G—d, I was afraid to trust him." The defendant was not under arrest when this conversation occurred.

The character of this last witness, and his reputation in the community for truth and veracity, were assailed by two or three witnesses. It is to his evidence the charge relates upon which the conviction is reversed. The remaining testimony is not essential to an understanding of the case.

Gammage & Gregg, for the appellant, on the charge of the court, cite 43 Texas, 1; 41 Texas, 619; 41 Texas, 23; 25 Texas Sup. 342; 42 Texas, 360; 1 Texas Ct. App. 440.

Horace Chilton, Assistant Attorney General, for the State.

White, P. J. The bill of exceptions shows that after the statement of facts in the case had been agreed to by the counsel, approved and certified by the judge, and filed by the clerk, on the verbal motion of the prosecuting officer, the judge added to the statement by interlineation a certain omitted statement of one of the witnesses with regard to the value of the money. This was done over objections of defendant's counsel, but the bill of exceptions does not show that the objection was that no such testimony was adduced; on the contrary, the fact that there was such evidence, if not conceded, is not controverted by the bill, and the objection seems to have been urged solely to the right and authority of the judge to change the statement of facts, after it was filed as part of the record, under the circumstances detailed.

Before his approval, the rule is well settled, that the judge may amend, add to or correct the statement submitted to him, so as to make it speak the truth fully, with regard to the facts proven. *King* v. *Russell*, 40 Texas, 124; *Courtney* v. *The State*, 3 Texas Ct. App. 258. And in *Deggs* v. *The State*, 7 Texas Ct. App. 359, it is said: "A purpose of the law in requiring that the statement of facts should be approved by the judge, was to enable that officer to supply omissions which had been made by counsel, either through accident or design, and which were essential to a proper presentation of the case on appeal." In this view of the object and purpose of the law, it occurs to us that the court could at any time during the term, and whilst it had control of the record, upon a proper representation that an error of omission or commission had been committed in preparing the statement, correct the same according to the truth of the matter. But after the statement has been agreed to, certified and filed, such correction should never be made except in most palpable cases of error, or upon the most satisfactory proof of the same. In this instance, as before stated, there seems to be no question with regard to the fact of the correctness of the judge's statement and addenda, so far as it purported to give the omitted testimony. We cannot see how the action can be held erroneous.

Serious objection and complaint is made to that portion of the charge to the jury contained in the following language, viz.: "The confessions of the defendant are in evidence before you, and if in your best judgment you shall give no credit to the witness who professed to detail them, you will then look to the other testimony in the case, and apply to it the rules relating to circumstantial testimony. If you give credence to the witness who professed to detail the confessions, you need not apply to the evidence those rules as to circumstantial testimony."

This charge, it occurs to us, was directly upon the weight of the testimony. It was in effect, if not in fact, tantamount to telling the jury "if you believe the testimony of the witness who has testified to defendant's confessions, then you will not look to or consider the other evidence in the case." This was, in the contingency mentioned, depriving the defendant of the benefit of any testimony offered by him, by requiring the jury not to look to or consider it. A charge in every respect similar was given in the case of *Rice* v. *The State,* 3 Texas Ct. App. 451 and upon consideration of which the same was declared erroneous, the court holding that "it is not the province of the judge to say to the jury on what evidence they should convict. The jury are the exclusive judges of the facts proved and of the weight of the testimony; and a charge to the jury is not unexceptionable if it expresses or intimates any opinion on the weight of evidence, or the credibility of statements made by the accused or the witnesses." [Citing *Ross* v. *The State,* 29 Texas, 499; *Jones* v. *The State,* 13 Texas, 175; *Butler* v. *The State,* 3 Texas Ct. App. 48.] See also *Lunsford* v. *The State,* 9 Texas Ct. App. 217.

Because the charge of the court was upon the weight of evidence in the particular pointed out, the judgment rendered below is reversed and the cause remanded for a new trial.

Reversed and remanded.

Tom McGuire v. The State.

1. **Evidence.**— In a trial for assault with intent to murder, the defense proposed to introduce the county attorney for the purpose of proving that an indictment had been found against the prosecuting witness for assault to murder the defendant, and also proposed to introduce the indictment for the same purpose; to which the State objected, and the objections were sustained. *Held*, that the court did not err in this ruling.
2. **Jury Law — Case Stated.**— The defense complained that the sheriff was present in the jury room during the deliberations of the jury, and when a juror proposed to return to the court and report disagreement, he advised against such proceeding and said that the court would not yet discharge the jury. The trial court explains the bill of exceptions to the effect that the sheriff heard nothing said in the jury room except the proposition to report a disagreement, and only said that the court would not discharge the jury after so short a deliberation. *Held*, that no prejudice to appellant is apparent; but note the suggestions of this court concerning the presence of sheriffs during the deliberation of juries.

Appeal from the District Court of Walker. Tried below before the Hon. W. D. Wood.

The indictment charged an assault with intent to murder A. B. McGuire. The verdict found defendant not guilty of assault to murder, but guilty of a simple assault, and assessed his punishment at a fine of $25.

Wynne & Brown, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

Winkler, J. It is not deemed important in this opinion to consider specially more than two questions presented in the appellant's bill of exceptions, treating the first and second grounds of complaint as being really but two different phases of the same subject. 1st. The defendant offered to prove by the district attorney that there was pending against the person upon whom the assault is alleged, and who was a witness for the prosecution, an indictment for assault with intent to murder the appellant. 2d. He offered an indictment against the State's witness, charging him with such offense as mentioned above. It being claimed that both the indictment in the present case and that against the witness originated in and grew out of the same difficulty. The court refused the testimony, and the defendant excepted.

The matters set up in the fifth and sixth paragraphs of the bill of exceptions relate to another phase of the case, and, considered together, show this state of facts: that the sheriff, not being one of the jury, was present during the deliberation of the jury while considering the case, and, when there was a proposition made by one of the jury to return into court and report that they could not agree, the sheriff said to the jury, "Gentlemen, you need not go up now, because the judge will not discharge you." The judge in signing the bill of exceptions appends the following: "As to exceptions 5 and 6, it appeared that while the sheriff was in the room where the jury were deliberating, he did not hear what was said, except a remark made by one juror, and the proposition made by one juror, to report to the court that they could not agree; which was not agreed to by the jury, and in response to which the sheriff made the statement to the jury that they had been out so short a time (fifteen or twenty minutes) that the judge would send them back, — when they again proceeded," etc.

With reference to the first subject, we are of opinion the court did not err in refusing to permit the district attorney to testify that there was an indictment pending against the State's witness, or in refusing to allow the introduction of the indictment. The testimony offered did not tend to support any hypothesis which could have influenced the question of the defendant's guilt. If it was offered for the purpose of showing that the witness was biased or prejudiced against the defendant, that fact is not shown by the bill of exceptions, and hence we are not called on to decide whether it would have been admissible for that purpose or not. As the question is here presented we fail to perceive its relevancy. Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis,— a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less probable. Whatever is a condition, either of the existence or of the non-existence of a relevant hypothesis, may be shown. But no circumstance is relevant which does not make more or less probable the proposition at issue. 1 Wharton's Law of Evidence, §§ 20, 21. The proposition at issue being the guilt of the defendant, the testimony offered had no tendency to make more or less probable the proposition at issue, and was therefore irrelevant and inadmissible.

With reference to the matter of the presence of the sheriff in the jury room and his suggestion to the effect that the court would not discharge them on so short a consideration of the case, we do not desire to say more than that, from the statements of the judge, it is not perceived that anything was said or done by the sheriff to the defendant's prejudice, such as would warrant a setting aside of the verdict. We are constrained, however, to say that there is no authority given to a sheriff or other officer to be present and in condition to put in a word, a look or a nod susceptible of being understood as a hint to the jury one way or the other. The attention of trial courts and sheriffs is invited to art. 690, Code Crim. Proc., on this subject.

We have not overlooked other matters complained of in the record and discussed in the brief of appellant's counsel. The trial seems to have been fair and impartial. There is nothing in the charge of the court by which the jury could have been misled to the defendant's injury under the evidence. Finding no such error as would warrant a reversal of the judgment, it is affirmed.

Affirmed.

HURT, J., does not concur in what is said as to the testimony offered and rejected.

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GEORGE MCPHAIL *v.* THE STATE.

THEFT — CHARGE OF THE COURT.— A conviction for theft of certain oxen was had upon evidence from which the jury might have inferred that, though the defendant killed the oxen without their owner's consent, and afterwards skinned them and appropriated the hides, yet that he killed them because they were depredating on his crop, and with no intent to appropriate them or any part of them. *Held*, that the trial court should have distinctly instructed the jury that, in case they so found the facts to be, the defendant was not guilty of theft of the oxen. It was not sufficient to instruct that such a state of facts would warrant a conviction for the misdemeanor of killing live stock without the owner's consent, etc.

APPEAL from the District Court of Gonzales. Tried below before the Hon. EVERETT LEWIS.

The opinion of the court gives the evidence in full. The charge to the jury gave them clearly the law applicable to the case if the felonious intent existed at the time the defendant killed the oxen, and then proceeded as follows: "If the jury believe that the defendant did not kill said oxen, either one or both, for the purpose of appropriating the hide to his own use, but that he did kill either one of them wilfully, without the consent of the owner, then they should acquit of theft, but find him guilty of a misdemeanor, and assess his punishment by a fine not exceeding one thousand dollars.

No brief for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

Hurt, J. The appellant was charged with the theft of two oxen, was convicted, and his punishment assessed at two years' confinement in the penitentiary; from which judgment of conviction he appealed to this court. Upon the trial these facts were proved by the State, to wit: "By owner, that the oxen had been gone some two weeks, and he went to the appellant's on Tuesday, the 22d of April, and found the carcass of one of the oxen within ten or twenty yards of the defendant's fence; the hide had been taken off, and dragged away. He trailed the drag and found the hides of both in the defendant's smoke-house; recognized them as the hides of his cattle; never gave consent," etc.

Morris May, for the State: "The night before the oxen were killed I stayed all night at defendant's. About sunrise next morning I and defendant started across the field of defendant. Defendant had his gun. We saw the oxen in question in defendant's field. Defendant ran them out of the field. After he got into the woods, he cut a stick, knocked out a shell and put in a cartridge. He went about six yards from the fence, and shot at the oxen, which were about forty yards from him, and one standing behind the other. One of the oxen went about ten steps and laid down, and the other stood by him. Defendant's wife then called us to breakfast. Defendant and I rode over the neighborhood until twelve o'clock, when we ate dinner at defendant's house, and I went home. When defendant took up his gun, he said he was going turkey-hunting. I went with him for the purpose of staking my horse on a piece of grass land in defendant's field. Defendant's corn was six or eight inches high;

the oxen were in it when we first saw them. Don't think defendant said anything at the time of the shooting. Before running them out, he said he believed the oxen would eat up his corn, as he hadn't time to fix his fence. Defendant had a very indifferent fence; made of poles and rails, averaging about four poles. This occurred on Sunday, the 20th of April, 1879."

Archer Tally, for the State: "Am well acquainted with defendant; live about two miles from him; see him at the bar. On Monday or Tuesday after the killing of the oxen, about night, defendant came to my house, and proposed to sell me his crop, saying that he had to leave the country, that somebody had killed some oxen near his house, and that he and Tal Gibson had skinned them, and he feared he would have trouble about it."

These being the facts the appellant requested the court to charge the jury, "That an after-appropriation of the hides would not warrant a conviction under the indictment unless the jury believed from the evidence in the case that, at the time of the killing, there was in the mind of the defendant an intent to appropriate the oxen or some part thereof to his own use."

The court proposed to insert in this charge, after the word "conviction," the words "of theft;" which was not agreed to by counsel for defendant, and the charge was refused.

The case as made by the facts demanded of the court below a charge conveying the exact idea contained in the refused charge touching the question of theft, whether asked or not. It may be true as a legal proposition that the defendant may have killed the oxen, and afterwards conceived the intent to appropriate the hides, without being guilty of theft; and the jury should have been informed in unmistakable terms of this legal fact. And this law should have been given to the jury separate and distinct from every other question. After having applied this law to the facts, clearly and unmixed with any other matter, if deemed necessary, the court should have called the attention of the jury to the misdemeanor. The intent to appropriate at the time of the killing being, under the facts of this case, the all-important and necessary ingredient of theft, and the jury naturally being disposed to infer this intent from the appropriation alone, a charge such as was indicated by that which was refused was imperatively demanded.

The other questions raised in the record will not arise upon another trial. The law of this case,—that which was absolutely required by the facts,—not being given in the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

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W. W. SIMMS *v.* THE STATE.

1. JOINDER OF OFFENSES — DUTY OF STATE TO ELECT BETWEEN COUNTS. When an indictment contains more counts than one, and they charge distinct felonies, it is the right of the defendant, as soon as the prosecution has developed its proof, to require the State to elect on which count a conviction will be sought. The election should, as a general rule, be made before the defendant enters upon his evidence.
2. SAME — PRINCIPALS AND ACCOMPLICES.— The first count of an indictment for the murder of one S. charged the defendant as a principal offender, and the second charged that one P. was the princial offender and the defendant an accomplice. When the state closed its evidence in chief, the defense moved that the prosecution be required to elect between the counts. In view of the rule that a party indicted as a principal cannot be convicted as an accomplice, and *vice versa*, as well as on account of differences in the rules of evidence applicable to such diverse prosecutions, it is *held* that the motion should have been sustained.
3. SAME — MURDER.— The state was allowed, over objection, to prove certain acts and declarations of said P., done and made subsequent to the homicide, and when the defendant was not present; and the defendant was found guilty of murder in the first degree "as prin-

cipal." *Held*, that, as such acts and declarations of P. were not competent evidence under the count which charged the defendant as a principal offender, their admission may have been prejudicial to him, and therefore was material error.

4. CIRCUMSTANTIAL EVIDENCE.—In cases wholly dependent on circumstantial evidence no definite line of demarcation between proximate and remote facts can be drawn, and the criterion of their competency is merely whether they tend to cast any light, however feeble, upon the subject of the inquiry. See the facts and the opinion in this case in illustration of the latitude allowable in such cases.
5. EVIDENCE OF DECEASED WITNESS.—Whatever the former rule may have been, it is now settled that, to reproduce the testimony given at a former trial by a witness who has since died, the person called to prove it may state its substance, if unable to repeat its precise language.
6. CONFESSION OF A CONFEDERATE.—In the trial of a defendant on an indictment which charges him as an accomplice, it is competent for the state to prove confessions of the principal offender, for the sole purpose of establishing the latter's guilt; but the jury should be instructed that the confession is not evidence against the defendant for any other purpose.

APPEAL from the District Court of Limestone. Tried below before the Hon. D. M. PRENDERGAST.

This is the second appeal of W. W. (commonly called Bunk) Simms from a conviction for murder in the first degree. The case upon the former appeal is reported at page 230, 8 Texas Ct. App. Reports, and a summary of the evidence was there given. The rulings in the present appeal require a more full and specific detail of the testimony.

William Simms, a brother of the appellant, was a single man who lived on his stock farm in Limestone county. While sitting at his supper table, May 31, 1878, he was assassinated by fire-arms. At the ensuing September term of the District Court of Limestone county, the grand jury returned separate indictments against the present appellant and one C. L. Avery. That against the appellant contained two counts, by the first of which he was charged as a principal offender in the murder of William Simms, whereas in the second it was charged that one J. T. Plummer was the principal and the appellant an accomplice. The second trial of the appellant in the court below was had in July, 1880, and resulted in a verdict which convicted him "of murder in the first degree as principal," and assessed his punishment at a life-term in the penitentiary. A new trial was refused, and he appealed.

At the trial in the court below, the first witness examined by the State was Pete Williams, a negro, who said that at the time of the killing he was a tenant of the defendant. One night about a month before the homicide, on his way to the house of the defendant, to get some instructions about his work, he overheard some conversation, before he reached the house and near the defendant's fence, between defendant and one J. T. Plummer. These parties he first recognized by their voices. The defendant said to Plummer: "I want to get you to do that work for me;" but did not say what the work was. Plummer answered: "When I tell a man I will do a thing for him, he may depend on it." The defendant then said: "Bill won't leave, I can't leave, and we both can't live in the same county." The defendant told Plummer that he would pay him well to have the work done, and would prefer having some one else do it, but if he could not get others to do it, he would do it himself. The witness remembers nothing else that was said on this occasion. The night was very dark. As soon as the witness had heard this much pass between the parties he walked up to them, and Plummer said: "Hello, Pete, are you right from home?" Witness answered, "yes," and Plummer asked, "did you hear what I said?" Witness replied, "no; but I heard you talking of a mighty big day's work." This talk occurred at a board-pile, near and outside the fence around defendant's house.

On the day of the killing, in the evening, when the sun was about an hour and a half high, the defendant came to a field in which the witness, Plummer and C. L. Avery were at work. He first approached the witness and talked about some mules that witness had let get away and which he had that day been hunting. He appeared somewhat angry with the witness because of the mules straying, and said that he had looked for them at every place but one and would then go there. Witness said, "hell, it is nearly night now!" He then left the witness and went to Plummer and Avery, and the three joined in a conversation. Presently Plummer and Avery unhitched their teams, and the three went off together towards the house, passing through the corn and out of sight of witness. The witness saw nothing more of any of them until after he heard the report of a gun that night.

After the witness had eaten supper and while he was standing on his gallery he heard the report of a gun, and, thinking that the defendant was slaughtering a beef, he started to his house to assist in skinning and dressing it, in order to get a part of the meat. It had been the practice of defendant to kill beeves at night, and on such occasions he would send for witness to assist in dressing the meat. It was about a quarter of a mile from the house of witness to defendant's house, and thence about a mile to the house of the deceased. When the witness had passed the lane near Plummer's house, and reached the mouth of it, he heard voices approaching him from the direction of Summers' pasture, and, looking, discovered that the parties were Plummer and Avery, both walking, but the former leading the "Jack Sims" roan mare. The witness then turned and walked on ahead of these two and crossed the fence near Plummer's house. The two came up near witness and turned the mare in his lot and they went up towards the house. The witness could not hear what was said when he first discovered the parties, but when the two got near the yard gate, Avery said to Plummer: "We've done a good night's work to-night," and Plummer responded "yes." Avery then said "I will go up to old Pete's, and see where he is — he is always prowling around. I will see his wife about my clothes." When the witness heard this he "whipped" around and ran on to his house ahead of Avery, and went into his house. Avery came up to the house whistling, and witness went to the door buttoning his pants as though he had just got out of bed. He invited Avery into the house, but the latter declined, saying: "No, I have done a big day's work and am tired; I want to go home and lie down. I came up to see your wife about my clothes." He then asked witness' wife about his clothes, but did not say where they were.

Some time in the fall or winter before the killing, the witness was assisting Avery and defendant kill a hog. While there at that work he heard Avery say to defendant, "that fellow came to my house last night and cursed and abused me for everything he could think of." The defendant asked: "What fellow?" and Avery replied, "Bill," and asked, "what would you do about it?" The defendant replied, "the night has no eyes." The witness did not know the state of feeling existing between the defendant and deceased further than that they were "at outs." Plummer, Avery and defendant were on good terms and were together often, and Avery was in Plummer's employ. The witness told J. C. Sims, John Sims, T. J. Kennedy and Wash Pollock what he knew of the killing, on the Wednesday night following the Friday night of its occurrence. On that night J. C. Sims took the witness from his, witness', house, and told him he wanted witness to tell what he knew of the killing. The witness replied to him "it is mighty bad," and then informed him as he has deposed here.

On cross-examination, the witness said that the night on which he heard the conversation between defendant and Plummer at the board-pile, it was very dark, but the witness was very near them. He did not go up to them at first because he wanted to see if they were talking about him. He heard Plummer agree to do whatever it was that defendant wanted him to do. The witness had always been well treated at defendant's house, and had been in the habit of going there often. In going, he had to pass by Plummer's house. The report of the gun spoken of appeared to witness to come from defendant's house, and he thought a beef was being killed. Witness thinks that a straight line drawn from his house to deceased's would pass by defendant's. Witness admitted that at the coroner's inquest he denied knowing anything about the killing, and that he made the same denial before the citizens' meeting which was called to investigate the matter. The witness denied that he saw W. J. Reeves at that meeting, but admitted having seen him at Yerbey's blacksmith shop on Wednesday following the killing, but denied that said Reeves said to him in substance that he and other citizens believed that he, witness, had something to do with the killing, and that it was done with his, witness', gun, and promised the witness protection if he would "come out and tell all he knew."

This witness further testified on cross-examination, that on the Wednesday after the killing, and after witness had returned from Yerbey's blacksmith shop, the defendant came to him and told him that he was "playing off" in his work, and had been beating his (witness') wife, and that he wanted witness to leave. This the witness declined to do, unless the defendant would pay him for his crop; which he said he would do. Defendant was mad but did not curse the witness. Witness was also angry. It was on the night following this day that witness told J. C. and John Sims, Kennedy and Pollock what he has here deposed.

On re-examination by the State, this witness testified that the reason he did not tell what he knew at first was that he was afraid. He was a stranger to people in the neighborhood. He was not called upon to testify in court until the defendant was arrested.

B. M. Burrow was introduced by the State to prove the testimony of the witness Pollock, deceased, on a former trial of this case. He testified that he was present, heard Pollock testify, and took notes of his evidence. The substance of it was that Pollock lived within a mile of the deceased, west. On the morning of the day of the killing he went to Groesbeck to witness the execution of a black man, and had promised to call by on his return and give the deceased an account of the execution. When he had arrived within about a mile of deceased's house, he heard a loud report of a gun, which he was satisfied proceeded from the deceased's house, and he knew that he had no gun. He saw no one until he got to the house. He saw the "Bunk" Sims roan mare, with a man on her back, going west, along a trail that led by his (Pollock's) house. He saw the deceased lying dead about four feet from the door, his body bloody from his hips up. Pollock testified that from the house of deceased he went by Pelton's and Deaver's and told them of the death of deceased, and thence to Summers', where he found Burns and told them. Burns told him to go to Gregory's and notify him. On his way to Gregory's he met "Bunk" Sims (defendant) about four hundred yards from Summers' house, and about a mile and a half or three quarters from deceased's, traveling a cross-road that ran by his (Pollock's) house. The defendant could have gone to deceased's this way. Pollock, according to his testimony, saw defendant again that night about eleven o'clock, coming from the direction of deceased's, riding a black horse. His wife asked him if "Billie" was dead, and he replied to her "they say he is," and then asked for coffee, saying he had had no supper. Two men came with defendant. The defendant called to witness (Pollock) but he did not answer. He saw defendant again next day at Mrs. Summers'. He, defendant, did not go to deceased's house next day nor to the funeral, nor did Pollock know that he was there at all after the killing. He told John Sims first about seeing the mare leave deceased's, and, after pointing out the mare to said Sims, saw him measure the mare's feet, and some tracks near deceased's house, and they were alike.

This witness on cross-examination testified that Pollock stated in his evidence on the former trial that he was traveling a cow-trail, south, that led into the big road about a quarter of a mile from deceased's house, when he heard the gun fired. He was within forty-five or fifty feet of the roan mare when she left the house, but could not recognize the man riding her, nor tell whether or not she had on a bridle and saddle. He got down, went in and stayed long enough to see that the man was dead, and then rode to tell the neighbors as fast as his horse could go. About one hundred yards from where he met the defendant the roads forked, and he could not say which one the defendant had been traveling. One of the forks led to Navasota, the other to Groesbeck. In going to Gregory's from Summers' the traveler has to go in a direction opposite from deceased's.

A. G. Camp, for the State, was also introduced to prove what Pollock had sworn to.

J. T. Plummer, for the State, testified that he had known the deceased in his life-time, and had known defendant and Avery for six or eight years. The latter lived at times with defendant and at others with Ed. Summers. The witness did not know when the deceased and defendant first "fell out," but knows that they did not "get along" together. They first disagreed about some hogs, and the hard feelings engendered continued up to the time of the killing. A plan to kill the deceased had been matured. The defendant proposed to the witness, time and again, to go with him and kill the deceased. These propositions were first made one or two months before the killing, and were repeated every few days, sometimes in the field and often at the house. The witness tried to beg out of it. One of the places where the plans were talked over, was at the board-pile near the defendant's yard fence. Witness, Avery and defendant were present, the witness and defendant standing up and Avery crouched down by the pile. In this conversation the defendant said that the deceased had injured him — killed his stock — that deceased would not, he could not leave, and both could not live in the same county. The defendant said that he would pay well for the killing; would give the witness $200 to do it; that if he could not get it done he would do it himself. He said further, that Avery had agreed to help him, and Avery said "yes;" that he would assist in any way he could. If any one came up while the party were at the board-pile witness did not see them. He did not see the witness Pete Williams that night.

Late on the evening of the killing the defendant came to the field where the witness and Avery were at work. He spoke to Avery first, and then approached the witness and asked him if he was ready to go with him. He then went to see Pete Williams about some mules that were lost, or a horse with a sore neck, or something of the kind. The defendant then returned to witness and asked him what he was going to do, saying, "We've told you now, and you've got to go with us." The three then went out of the field, through the back part, to where the defendant had his black horse and roan mare hitched. From there they went to an old house containing some corn or shucks, and defendant got a shot-gun. From there the party, defendant, Avery and witness, went to the house of the deceased, the defendant carrying the gun. They rode up in front of the house, and defendant fired the gun. The deceased jumped up, swung around to the door and exclaimed "Oh! Bunk" three times, and fell out on the ground. Avery then jumped over into the yard and fired a six-shooter twice. The deceased did not halloo after the pistol shots were fired. The witness was sitting on his horse some ten feet behind defendant and Avery, and could not see into the house. Defendant was on the ground with the bridle reins over his arm when he fired. Avery was on the ground when he fired, but witness did not know what he did with his horse in the meantime. After the shots were fired defendant and Avery mounted the horses and loped off in the direction of Wash Pollock's; the defendant, who got on his horse first, a little ahead of Avery. The witness turned and rode off, starting a little before either of the others. Avery and defendant started nearly due west, and the witness went direct home, in a course nearly due north. He was overtaken by Avery on a little prairie. They went around Summers' pasture, and Avery turned his horse in this pasture. From here witness and Avery went on around to the lot, the witness walking with Avery and leading his horse. After the horse had been turned into the lot at his, witness', house, Avery said "We've done a good night's work." To this the witness made no response. Avery then started to Pete Williams', but if he told witness why he was going witness did not hear him. He left whistling, and came back after awhile and stayed all night with witness. The defendant came to witness' house next morning very early, called witness out on his gallery, and told him the deceased had been killed. He then left and went back to Summers'. Avery and witness' family were in the house at the time.

The gun that was used in the killing was bought by the defendant in Jewett, some 17 or 18 miles distant. The defendant had a rifle which was out of repair, and he wanted to take it to a smith, and the nearest he knew of was at Jewett. The defendant, who was furnishing witness with coffee, told him if he, witness, would go with him to Jewett he would get a supply of coffee. The witness went with him, and this was the only time the witness was ever in Jewett. They went into a store, and defendant was looking at a gun when the witness left him, but returned presently and found the defendant jewing the merchant on the price of the gun. He finally bought it for $25, giving a $50 greenback bill in payment and getting change. The merchant held the bill up to the light to examine it, when the defendant said: "You need not be examining the bill, it is good." The merchant said, "it is so seldom we get a $50 bill, I want to see if it is genuine." The defendant bought powder, caps and shot, and the two left town. The defendant carried the gun from town with him, and took it to an old house that had corn, shucks or something in it. This occurred two weeks or more before the killing.

After the killing Avery and defendant cautioned the witness about telling, and said that if they told, Bony Simms, John Simms and others would kill witness, and if witness told, they (Avery and defendant) would kill him. Defendant told witness to take the gun and leave the State, and informed the witness where he, the defendant, and Avery had hidden it, at a point on Lick Branch. Witness got the gun and hid it at another point, where he told Gregory he would find it, after he had been arrested and brought back to Texas. He first told Gregory to look for it where defendant had hidden it, and afterwards told him where he had subsequently hidden it, giving him a plot by which it could be found. The witness left the State when requested by defendant, but was furnished no money by him.

On cross-examination, the witness stated that he participated in but one conversation at the board-pile regarding this matter, and knew of but one, which was that he had described. He did not see Pete Williams that night, did not speak to him, and Pete Williams did not join him, Avery, and defendant at the board-pile. It was "tolerably" dark that night, but the witness thinks that the stars were shining. When the defendant joined the witness in the field on the evening of the killing, he was 150 or 200 yards distant from Pete Williams, and could not see him, as both cotton and corn were growing between the points occupied by them. The sun was not quite down when the party left the field. The house in which the gun was concealed was situated 100 or 200 yards distant from defendant's house. It had a door-shutter, but no lock, and was not kept locked. The witness had no fire-arms on the trip to the deceased's house. There is no other road leaving the house of deceased going north but the one traveled by witness after the shooting, and Burns' and Pelton's houses can be reached by that road, and it is the only road to witness' house, and the most direct one to Summers'. It was scarcely good light the next morning when the defendant reached witness' house and told him that deceased had been killed. The witness stated that he went to the deceased's house next morning and saw the corpse, and admitted that it affected him somewhat, but did not remember that he cried.

The witness admitted that himself and family took dinner, on either the first or second Sunday before the killing, at the house of Peter Roehurst, but denied that he called Roehurst out behind the house and asked him if he had heard of his, witness', row with deceased, and on being answered in the negative, told said Roehurst that the deceased "run square over" him a few days before, and that he had never received such abuse and cursing,—that Roehurst told him that he should not have endured it, and he answered that he was not armed and knew that deceased was, but that now he had borrowed the defendant's pistol, and if deceased run upon him again, one or the other would die then and there. The witness was not at the inquest, but was before the citizens' committee on the Monday following the tragedy, and there denied all knowledge of it. The citizens on that occasion opened his shirt and examined his shoulder. The witness owned no pistol, but that of the defendant was sometimes kept at his house. The witness remembered having taken a trip to Mexia a short time before the killing, but did not tell Thomas Wills on that trip that he had taken a pistol to town to have repaired. He did not remember having seen Wills next day, and knows that he did not send a message of any kind to deceased by Wills. He denied that Wills ever brought him such word from deceased as that he, deceased, "would not make friends with a d—d hog-thief." The witness did not intend to make Gregory believe that he would find the gun where he first told him "they" hid it. He did not tell Gregory that he had overheard defendant and Avery, in jail, talking late one night about where they had hid the gun, and could now tell him, Gregory, where he could find it. He remembered having a conversation with Henry Avery about deceased, near his, witness', well, a few days before the killing, but did not tell him in that conversation that deceased had cursed and abused him in the lane near Summers' mill. Did not tell him that deceased had accused him, witness, of stealing hogs, and that in the event deceased accused him, to his face, one or the other would die. All that witness told Henry Avery on that occasion was that when he came up with deceased in the lane, deceased asked him if he, witness, and "Bunk," the defendant, had eaten up all the meat of his, the deceased's, hogs witness and defendant had killed, and that he, witness, replied to deceased that he had killed none of his hogs,—that if any one had, it was defendant who had done so. Witness further asked Henry Avery to tell deceased that he had killed none of his hogs.

On re-examination the witness declared that if the deceased's name was called by either Roehurst or himself during the day the latter spent with Roehurst, he had no recollection of it. The gun exhibited, though rusty, the witness believed to be the gun used in the killing.

M. Levy, who was a merchant in Jewett in 1877 and 1878, testified for the State. He remembered having sold a gun to two men. He saw the men but twice, and had no positive recollection of their description. One of them came into witness' store first, alone, and said that he and a friend wanted to purchase a gun. He went out and returned with another man, and they bought a gun from witness' brother for $20, paying a $50 bill. When his brother held the bill up to the light to scrutinize it, one of the men said, "the bill is good," and witness' brother answered that "it is so seldom we get $50 bills I want to examine it." One of the men was taller than the other. The witness could not identify the gun exhibited. He had had such character and brand of guns in stock, and so had other merchants of Jewett. The witness did not remember having sold another gun and getting a $50 bill on any other occasion. There is no material difference between this and the testimony of J. Levy.

J. I. Moody, for the State, testified that the citizens having resolved to investigate the murder, he with others was detailed to go to Ed. Summers' house and notify parties there to appear before the citizens' committee at the church, for examination. When the defendant was called out of the house he walked to the fence, leaned over it, placed one foot on a rail, and in that attitude talked to the party. Witness explained to him what was required, and noticed that his appearance was unusual, and that his foot trembled somewhat. Witness attributed this unusual appearance and emotion to grief over his brother's death. The defendant said that he had no horse and could not go, but witness told him that he must.

Cross-examined, the witness said that the defendant did not hesitate to come out of the house when called, but said that he had been sick ever since his brother's death. He got his horse finally and went on to the church, following the party. M. C. Rogers, another of the party who notified the defendant to go before the committee, corroborated the last witness in every particular.

G. S. Gregory testified, for the State, that he was a justice of the peace at the time of the killing. He was notified of it on the same night, about 9 o'clock, by Wash Pollock and Nath. Pelton. He found the deceased lying on his back, dead, about four feet from his door. Examining the body next morning, he found three shots in the arm, two in the back and three in the side, made with buck-shot, and one large hole in the neck ranging downward, and another large hole in the breast, these last two being powder-burned. He found rotten yellow-brown paper strewn across the yard and over the house, which he took to be wadding fired from the gun. He saw wadding drawn from the gun at a former trial, and it appeared to be the same kind of paper. From the way the gun was evidently fired, and the position of things in the house, the deceased must have been sitting at his table, eating supper. There was a piece of bread broken off and lying by his plate, a piece of meat was in the plate, and a coffee pot was sitting to the right. A churn had been overturned and milk spilled on the floor. The chair was likewise knocked over. The witness extracted two balls from the body. These are similar to those drawn from the gun on exhibition.

As justice of the peace, the witness held an inquest on the body, the morning succeeding the killing. The defendant was not present. If Avery was about the premises next morning at all, witness did not see him. Plummer was present. Avery was examined a little before the inquest. He has one crippled foot, and wears a piece of wood or leather attached to his shoe that is not on ordinary shoes. The witness examined for tracks but found none. The witness was likewise one of the citizens' committee. The defendant was before that committee, but denied any knowledge of the killing, and could say nothing about it except that some suspicious-looking men he did not know passed his house the evening of the killing, coming from the direction of the deceased's house. This fact was also stated by others.

Plummer, while in jail, told the witness where the gun used in the killing was secreted, but on search witness failed to find it. A second time Plummer told him where the gun would be found, but search resulted as in the first instance. A third time Plummer told him, and gave him a diagram of the locality, and the gun was found, one barrel empty, and one loaded. The gun exhibited is the same.

Cross-examined, the witness said that the second time he went to see Plummer about the gun, Plummer told him he could identify the locality, having overheard Avery and defendant talking in the jail about where they had secreted it.

Sam Johnson testified, for the State, that he was at defendant's house on the night of the killing. Himself, Jack Sims, Wm. Vest, and James Pelton were staying there. He was about one mile from the house of deceased, and about dark heard three shots, one louder than the other two, and heard some one halloo as in distress, at the first fire, and keep it up until the second shot fired. Witness and the others then went to sleep, and about 10 o'clock were awakened by defendant and Wm. Pelton, who told them that deceased had been killed, and that they had just come from his house, but did not say who did the killing. The defendant was crying and appeared to be in distress. Neither witness nor Jack Sims went to deceased's house that night, nor did witness know whether or not the defendant went to the burial. The witness heard some one pass by him, going north and towards Plummer's, after the shooting, but did not see who it was. The defendant was not at his house when the witness heard the guns fire. When the party were talking about the killing that night, defendant said it might have been done by a party who went through the country the winter before. When the defendant left he said that his wife was sick, and was at Ed. Summers', and he was going to her.

The testimony of Viney Williams, for the State, is immaterial, except that it corroborates her husband, Pete, as to Avery's coming to her house about his clothes the night of the killing, and further, she testified that defendant asked her to let him run Pete off, assuring her that he was "playing off," was not working for her, and that she could get another husband as good as Pete. She heard two shots the night of the killing while she was at supper. Pete was on the gallery when the shots fired, and went off, but she did not know where he went.

Nathan Pelton, for the State, testified that he was living at Ed. Summers' at the time of the killing, and went with Wash Pollock to Gregory's the night that it occurred. He corroborated Pollock as to meeting a man in the road en route. He did not know, but thought this man was the defendant.

John Burns, for the State, testified that himself and Ed. Summers were on the gallery at Summers' house when they heard the gun fire. Defendant was not there. In about an hour after the gun fired witness saw defendant at Summers'. He was riding his black horse, and stayed but a few moments, talking about the killing.

During this conversation he asked witness if he had any idea who could have done it, and witness replied, "No, unless it was you." Defendant then said he and deceased had been at "outs," but that he would take up for deceased as quick as he ever would. Witness was at deceased's about 12 o'clock that night, but did not see the defendant. On cross-examination, he said that defendant left Summers' with others, to go to deceased's, but witness did not know whether he went or not.

John Sims testified that he found a track about 50 yards from deceased's house, the morning after the killing, which he took to be Avery's, going from the direction of the house, and other tracks which he could not recognize. He did not know when these several tracks were made.

John McKay testified that he saw Avery at deceased's house the next morning after the killing. He rode up to the house, hitched his horse at the fence and went in, but witness did not know how long he stayed.

E. Hobbs, for the defense, testified positively that friendly feelings existed between defendant and deceased four or five months before the killing.

W. J. Reeves, testifying for the defense, contradicted the witness Pete Williams in his denial of a conversation with witness at Yerbey's blacksmith shop. He affirmed that the conversation denied by Williams in his testimony did transpire between the two at the blacksmith shop.

The substance of the testimony of Peter Roehurst was a contradiction of the evidence of Plummer as to what transpired between them on the Sunday that Plummer and family dined with him. He positively averred that Plummer did call him out of the house, and that the conversation denied by Plummer did there transpire. On cross-examination the witness said that Plummer did not say that he had told defendant what he wanted with the pistol he had borrowed.

Henry Avery, for the defense, contradicted the testimony of Plummer, wherein Plummer denied having told him at the well that if deceased accused him to his face of killing his hogs, one or the other should die, but corroborated him as to what further Plummer said in that conversation about the conversation between him (Plummer) and deceased. This witness was a son of the Avery implicated in this same murder. Avery, Sr., and the deceased were on good terms in January and February, prior to the killing, and two or three weeks later witness saw them coming out of the woods together. They had been hunting.

Bony Sims, for the defense, testified that he was present on Wednesday night after the killing, and heard Pete Williams' statements about the matter. He told the witness that Avery and Plummer did the killing, and when asked if they were all who had a hand in it, he replied, "I think your brother (defendant) was knowing to it." The defendant, witness and Deavers went to the house of the deceased after the killing, that night. Neither witness nor defendant got down from their horses, and defendant said nothing about the manner in which the deceased might have been killed. The defendant was arrested at Summers', and witness was present. He had told defendant that morning that he would be arrested.

On cross-examination the witness stated that he examined the ground around deceased's house for tracks, and found one he took to be Avery's from the peculiarity of an attachment impression, which could have been made by such a one as Avery wore on the shoe of his lame foot. The witness, being re-examined, said he knew nothing of the feeling existing between Avery and deceased — had heard nothing said by deceased of a difficulty between them. He did know, however, that deceased and Plummer had had a difficulty. Avery had been to the house of the deceased in the morning before the track spoken of was discovered, and witness could not say when it was made.

Jack Sims, for the defense, testified that he was a brother of deceased and defendant, and was at defendant's house with Sam Johnson and Vest on the night of the killing. Defendant and James Pelton came in late at night and told of the killing, and witness went out to look for his horse, but failing to find it, did not go to deceased's that night. Cross-examined, witness said that he was in Groesbeck on the day of the killing, but was at deceased's house next day, and found within 100 yards of the house a track they took to be Avery's from its peculiarity, and followed it to where some horses had been hitched, and from there followed the track about one mile. One of the tracks was that of witness' mare. He saw no horse tracks about the house of deceased. The witness did not know the state of feeling between the defendant and deceased,—they were friendly as far as he knew.

On re-examination the witness said he saw but one track he supposed to be Avery's, and did not remember at what hour of the day it was discovered. When the mare's tracks were first found they were in the path running east and west, going towards Wash Pollock's. The track of another horse than those of witness' mare was trailed for a mile, going from the house of deceased. The point where they had been hitched was about a quarter of a mile from the house. After the tracks were lost they were not again found, nor were the tracks going to the house found.

John Sims, for the defense, corroborated the statement of Bony Sims respecting the statements of Pete Williams about the knowledge of the killing, and the evidence of the last witness with regard to the tracks of the horses. In addition he stated that the horse tracks were trailed to a point near Wash Pollock's yard, and then returned and tracked them near to Summers' mill, where they struck around the pasture.

Thomas Wills, for the defense, contradicted the statement of Plummer denying the conversation with him in Mexia, incorporated in the statement of Plummer's testimony. He affirmed that the conversation occurred as denied by Plummer, and about two or three weeks before the killing.

John Baldwin, for the defense, stated that he arrested the defendant at Summers' about eight days after the killing. The arrest was made in the evening, and in the early morning of the same day the defendant had been informed that he would be arrested. Previous to the arrest the county had been guarded by the citizens, but was not guarded at the time of the arrest.

The questions raised in this court are disclosed in the opinion.

Farrar & Prendergast, and *Herring, Kelley & Williams,* for the appellant. While two or more offenses may be charged in separate counts of the same indictment, yet when all the evidence on behalf of the prosecution has been introduced, on motion of the defendant the State should be required to elect upon which count to try him.

The indictment in separate and distinct counts charges appellant as principal and as an accomplice.

When the evidence of the State had been introduced, appellant moved the court to require the county attorney to make an election, so that he might know the charge upon which the State relied. This motion was overruled by the court and exception reserved. *McKeen* v. *State,* 7 Texas Ct. App. 631; *Dalton* v. *State,* 4 Texas Ct. App. 333; *Fisher* v. *State,* 33 Texas, 792; *Lunn* v. *State,* 44 Texas, 85.

The State is not required to elect between different grounds of aggravation set out in an indictment for aggravated assault. *Waddell* v. *State,* 1 Texas Ct. App. 720. Nor in a murder case, because the indictment charges in a single count different modes by which death was caused. *Gonzales* v. *State,* 5 Texas Ct. App. 584; see also *State* v. *Edmondson,* 43 Texas, 162, and *Dill* v. *State,* 1 Texas Ct. App. 278. In the last case, says Ector, presiding judge: "The grand jury may be well satisfied that the homicide was committed, but not satisfied with the mode of death; and in order to meet the evidence as to the mode of death, as it may be developed on the trial, they are allowed to set out the mode in different counts, and then if any one of them is proved it is sufficient to support the indictment." Dill and others were jointly indicted for the murder of Reuben Johnson. The indictment contained two counts, one of which charged the murder to have been perpetrated by cutting the throat of deceased, and the other that it was committed by hanging. Says Justice Moore, in *State* v. *Edmondson, supra:* "If distinct and independent offenses are charged in the indictment, the objection of duplicity may be as applicable to it, if not more so under the Code, than at common law."

The distinction is manifest that while different modes in which an offense may have been committed may be charged in single or separate counts and the State not be held to an election, that when in the same indictment, in separate and distinct counts, substantive and independent offenses are charged, on motion made at the proper time, as shown in the case at bar, the state should be required to elect upon which count to try. The reason for this distinction is equally clear. There can be no prejudice to the defendant, or violation of any principle of law, in allowing the State to allege and prove, either in single or separate counts, as many different modes in which an offense has been committed, as the grand jury or pleader has been advised; and if any one is warranted by the evidence, the conviction should be sustained. But the principle that only one offense should be charged in an indictment, and if more than one, that the prisoner cannot be convicted of two offenses on the same trial; and that therefore the State should be forced to an election at some stage of the proceeding, is fundamental. The only question seems to be at what time in the progress of the trial the State should be required to make the election. About this there is some contrariety of opinion; but our courts, as will be seen from the authorities above cited, have established the rule observed by appellant, as shown in his bill of exception upon which this assignment of error is based. The reason for this principle is two fold: 1st, that the prisoner may know what specific charge or offense he is required to answer, and prepare for his trial accordingly; 2d, that in case acquittal or conviction, he may plead the judgment in bar of another trial for the same offense. From this it is quite apparent that it makes no difference that the different offenses charged in the same indictment have the same penalty.

The evidence of Pete Williams that appellant said to Avery, speaking of "Bill," on a certain occasion, some time during the winter preceding the murder, "night has no eyes," was too remote, immaterial and misleading.

In the winter before deceased was killed, Pete Williams testifies he went to appellant's to get some meat, who said he had none, but they could kill a hog; and while waiting for the water to heat, he heard Avery say to defendant: "Bunk, that rascal was at my house last night, and cursed me for everything he could think of." Defendant says, "Who?" Avery says, "Why, Bill." Defendant says, "He did?" Avery says, "Yes; what would you do about it?" And then defendant says, "Night has no eyes."

Admitting that the deceased was personated as "Bill" in this evidence of the mysterious, epigrammatic and eaves-dropping witness, Pete, and that the poetical and laconic expression imputed to appellant was used by him, and that he meant if he was in Avery's place, and deceased came to his house at night and cursed him, he would kill him, where is the predicate for its introduction against appellant? There is no evidence that deceased ever went to his house in the day or night-time and cursed him, or gave him any provocation to execute such a threat, if it can be so construed. And if a threat, it is too vague, indefinite and remote. It stands isolated and alone, and in no way connected with the homicide that occurred some five or six months thereafter; this and nothing more, conceding the worst possible construction that can be placed upon it. But can the expression be fairly held to mean a personal threat of appellant against deceased? Certainly not; and if not, then it was immaterial and misleading.

Evidence of an accomplice as to immaterial circumstances, uncorroborated, and not tending to connect the prisoner with an alleged homicide, is inadmissible; and when admitted over objections, as in this case, a reversible error.

The accomplice, J. T. Plummer, with great minuteness and circumstantiality, testified to the purchase of a double-barreled shot gun and some shot and powder by appellant in Jewett, some seventeen or eighteen miles from his residence, two or three weeks or a longer and indefinite time, before the deceased was killed; the concealment of the gun in an old house some one or two hundred yards from his residence, which had a door shutter but no lock to it; the getting of the gun from this old house the evening of the homicide; its concealment afterwards by appellant; the subsequent finding and re-concealment of it by himself (the accomplice); and his information to the witness Gregory, whereby it was found and identified by said Gregory. Appellant's objection to, and motion to exclude, after admission of this evidence, were both overruled.

The State also proved in this connection, by two witnesses named Levy, over appellant's objection, that they were merchants in Jewett, and that "They sold a double-barreled gun some two or three years ago (before this trial), — could not fix the time, — to two men, strangers to them, whom they did not know and could not identify, for $20, and that a $50 bill was paid, which one of them held up before his eyes and the light to examine and satisfy himself it was genuine. These witnesses could not identify the gun in court as one they had sold, but said they had some guns of the same make or brand some two or three years ago; that one other merchant in Jewett had a similar gun, and that merchants generally handled the same gun."

The State also proved in this connection by the witness Gregory, that the gun produced in court was the same he found under the directions of Plummer, that one barrel was not discharged, that he saw the load drawn out of it, that the wadding was brown rotten paper, and the kind he found on the ground from the fence to where the body of deceased was, and that the shot were similar to those he took out of deceased.

When fairly and legally sifted there is no evidence, direct or circumstantial, that connects appellant with this gun story, save that of the accomplice, Plummer. No witness sees them *en route* to or in Jewett. The witness, Levy, fails to identify either the prisoner or the gun. The circumstance as to the examination of a $50 bill may be true, and yet it does not logically or necessarily or legally follow that appellant used such a bill, was present at the time, or even bought a gun under any such circumstances. The accomplice is only supported to the extent that he and some other man bought a gun of the merchant Levy. It is by no means strange but natural that an accomplice, whose self-imposed task and business it is to free his own neck from the halter, by inculpating another, should insert into the web and woof of his tangled story as much immaterial truth, susceptible of corroboration, as possible. So if it be conceded that a gun was bought, there is no evidence, other than that of Plummer, that appellant was in any way connected therewith. There is no evidence, save that of Plummer, that appellant concealed any gun in an old house, or that on the evening of the killing he procured any gun from that old house, or from any other place, or that he shot deceased with a gun, or that he concealed the gun that was produced on the trial, or that he had ever seen or handled it. That Plummer knew where it was hid is certain, because he directed Gregory where to find it; but this does not confirm his story that appellant hid it the night of the murder, and afterwards told him where he hid it, and that he found it and hid it in another place, just before fleeing from the country. The jury, doubtless, received and acted upon the evidence of the accomplice, as to this gun story, as true in all its details, because they failed to discriminate that confirmation of his acts and knowledge in one or more particulars, wherein he connected appellant with himself, was no legal evidence as to the latter. As well said by Justice Clark in *Robertson* v. *State*, 9 Texas Ct. App. 209: "It is always a difficult task for a jury to comprehend this provision of law and to discard from their unpracticed minds the testimony of the accomplice in the search for the necessary outside corroboration. The witness testifies before them as do other witnesses. His statements are usually plausibly connected, and apparently sincere. Usually his own life or liberty is at stake, and dependent upon the conviction of his alleged confederate, and his confessed infamy is not likely to deter him from making any statement he may deem essential to his own preservation. He fixes guilt with almost absolute precision; and the circumstantial details he gives in evidence, added to his apparent or real desire to reveal all the facts attendant upon and constituting the crime, is calculated to easily impose upon a jury, and to cause them to place entire confidence in the truth of his evidence. They are likely to forget his infamy, and in an honest and laudable desire to punish the outrage upon the law, they adopt his evidence as a proper basis for their verdict, without much regard as to whether it is corroborated by other evidence or not."

In admitting this evidence as to the gun story, the well-timed admonition of Justice Winkler on former appeal of this case (8 Ct. App. 248) was disregarded. Says this jurist:

"On another trial, should the testimony be the same or similar to that of the present, the attention of the court is specially directed to the necessity of confining the jury, in their deliberations, to the testimony which tends to connect the defendant with the offense committed, to the exclusion of those phases of the testimony which have no such tendency."

The verdict of the jury is not supported by the evidence; and for this, the court erred in not granting a new trial.

Outside of the evidence of the accomplice, Plummer, the record will be searched in vain for anything showing, or tending to show, that appellant was present and participated in the murder. Instead of corroboration on this point, Plummer is flatly and pointedly contradicted both by the direct evidence and by the circumstances, or physical facts.

While there are some few minor circumstances of suspicion, they not only fail to engender conviction, but they are overborne by the circumstances in favor of appellant. His absence from his home and that of Summers', where his sick wife was, is reasonably accounted for, even if the burden rested on him, by Pete Williams, who shows that on the evening of the killing, about an hour by sun, appellant, who had been hunting his mules all that day, said he had hunted every place but one, and that he would then go there; when Pete said to him, "Hell, it is nearly night now." When notified the morning of the day that he would be arrested, and had from then until that evening to make his escape, instead of fleeing as a guilty man would do, he sought the officer who had the warrant for his arrest. And how completely are these few minor circumstances of suspicion, born of ignorant minds, with whom, after such a murder and such an accusation, "trifles light as air are proofs as strong as holy writ," dissipated, like fog before the rising sun, by his going to the house of Plummer very early the morning after the murder, and calling him out and telling him about the killing of his brother. Such conduct is utterly inconsistent with, and absolutely negatives, the idea of appellant's guilty knowledge, or joint participation in this alleged fratricide.

In support of the proposition that the verdict of the jury is not warranted by the evidence, and that for this cause a new trial should have been granted, we refer to the following authorities: *Simms* v. *State*, 8 Texas Ct. App. 230; *Jones* v. *State*, 7 Texas Ct. App. 457; *Coleman* v. *State*, 44 Texas, 109; *Tollett* v. *State*, 44 Texas, 97; *King* v. *State*, 4 Texas Ct. App. 256; *Jones* v. *State*, 4 Texas Ct. App. 436; *Barnett* v. *State*, 5 Texas Ct. App. 113; *Griffith* v. *State*, 9 Texas Ct. App. 372.

Thomas Ball, Assistant Attorney General, for the State.

WHITE, P. J. Appellant's former appeal in this case was from a judgment of capital conviction of murder of the first degree. *Simms* v. *State*, 8 Texas Ct. App. 230. His appeal in this instance is from a judgment of conviction of murder of the first degree, the punishment affixed being imprisonment in the State penitentiary for the term of his natural life.

Two counts are contained in the indictment; one (the first) charging W. W. *alias* Bunk Simms (appellant) alone with the murder, whilst the second charges that the crime was committed by one J. T. Plummer, but that before its commission he was incited, hired, encouraged, advised and aided to and in its execution by W. W. *alias* Bunk Simms, this appellant. In the first count the appellant is charged as a principal offender, and in the second as an accomplice to the murder.

By the second bill of exceptions it is shown that on the trial, after the evidence for the prosecution had been introduced, "the defendant moved the court to require the State to elect upon which count of the indictment it would try the defendant." The motion was overruled, and the ruling is claimed to be and forms the first error complained of in the able brief of counsel for appellant.

It cannot be gainsaid but that two separate and distinct offenses were alleged, since under neither of said counts could the defendant have been convicted as charged in the other,— the rule being well settled that when a party is charged as a principal offender he cannot, under the Code of this State, be convicted as an accomplice, nor *vice versa*. *McKeen* v. *State*, 7 Texas Ct. App. 631. This difficulty was doubtless felt and appreciated by the pleader, and hence the two counts. Had the rule been otherwise, there would have been no real necessity in this indictment for more than the single count charging defendant in the ordinary form with the commission of the murder.

There being two counts, setting out separate and distinct offenses, should the State have been compelled to elect? Our Supreme Court has declared, in *Lunn* v. *State*, 44 Texas, 85, that "when two offenses are charged in an indictment or developed by the evidence, the district attorney should be required to elect on which of the charges he intends to claim a conviction, as soon as he has examined the witnesses far enough to identify the transaction; and as a general rule the election should be made before the defendant offers his evidence." This rule has been followed by subsequent decisions of this court. *Dalton* v. *State*, 4 Texas Ct. App. 333, and cases cited. As applicable to the case here presented, we cannot, perhaps, better illustrate the rule and its necessity than by drawing the distinction between the two offenses with reference to the difference in a most material respect which exists as to the legality and admissibility of the evidence by which the two charges are susceptible of being proven.

Under the count charging the defendant as a principal, whether alone or in connection with others, the prosecution might have shown and have established not only the existence and actual perpetration of the deed in connection with other parties, but, having once established such conspiracy, would have been entitled, as against the co-conspirator on trial, to prove any act, declaration or admission of the confederate or confederates not on trial, done and said in pursuance of the common design and in furtherance of it up to the time of its commission, but no further. "Acts, conduct and declarations of each confederate, made and done during the pendency of a criminal enterprise, are competent evidence against all engaged in it, as each is supposed to approve and sanction all that was done or said in furtherance of the common object." *Cox et als.* v. *State*, 8 Texas Ct. App. 256; 1 Greenl. Ev. §§ 111 and 233. Such acts, conduct and declarations are held to be admissible as part of the *res gestæ;* but subsequent narrations, confessions or admissions stand upon a different principle, as the presumption is that they were not made in pursuance of a common design, and consequently they cannot be admitted as evidence to affect any one except the party by whom they were made. *U. S.* v. *Hartwell*, 3 Clifford, 221; *Draper* v. *State*, 22 Texas, 400;

McWilliams v. *State*, 44 Texas, 116; *Preston* v. *State*, 4 Texas Ct. App. 186. And especially is this so with regard to confessions made by one party after the deed has been committed; the general rule of law being that a man's confessions of guilt can only be used against himself.

Such rules, however, do not obtain where an accomplice is being tried separately from his principal. Accomplices under our Code would in most of the States and at common law be denominated accessories before the fact, and, save in cases specially excepted, the rules applicable elsewhere to the latter with us also apply to the former. *McKeen* v. *State*, 7 Texas Ct. App. 631; *Arnold* v. *State*, 9 Texas Ct. App. 435. Where a party is being tried as an accessory before the fact, or as an accomplice, it is essential as a predicate for, or condition precedent to, his guilt, that the State should establish the guilt of the principal; for his guilt is dependent on that of the principal, whether the latter is on trial or not. Whart. Crim. Ev. § 602; *Arnold* v. *State, supra.* But in thus establishing the guilt of the principal on the trial of the accomplice, the prosecution, when the confederacy between the two has been shown, is not limited to what was said and done by the principal before the consummation of the act; but, in addition thereto, the acts and conduct of the principal immediately following the commission of the deed, and tending to show he committed it, are competent evidence to prove the guilt of the principal. Whart. Crim. Ev. 702; *State* v. *Lewis*, 45 Iowa, 20. In other words, "whatever naturally and usually follows immediately on the commission of a crime,—the act of flying and escaping from the place, concealment and disguise of the person, and other acts and conduct of the like character, such as in and of themselves naturally imply connection with the commission of the crime,—are evidence of guilt, not so much in the nature of confessions and admissions as because they are the usual and habitual concomitants of the crime on trial. The transaction investigated on the trial,—the *res gestæ*,—consists not merely of the direct criminal act which constitutes the legal offense; the necessary preparations for the perpetration of the crime, the arrangements for escape, the act of escaping, concealment and disguise of the person, and other similar acts and conduct, are all parts of the transaction such as common experience shows naturally belong to the crime, and are habitually connected with the commission of the offense. In this point of view, the acts and conduct of the principal immediately following the commission of the offense are competent evidence to prove his guilt on the trial of the accessory" (or accomplice). *State* v. *Rand*, 33 N. H. 216; *People* v. *Stanley*, 47 Cal. 113.

And so also with subsequent confessions made by the principal. We are aware that a contrary rule was formerly held. Mr. Russell, in his celebrated work on Crimes, says: "Upon an indictment against an accessory, a confession by the principal is not admissible to prove the guilt of the principal; it must be proved *aliunde*." 1 Russ. on Crimes (9th ed.), side p. 76. This doctrine is based upon the leading case of *Rex* v. *Turner*, 1 Moo. Cr. Cas. 374. In the well considered case of *Hartwell* v. *U. S.* 3 Clifford C. C. R. 221, Judge Clifford in discussing Turner's case says: "If viewed as deciding that the confessions of the principal in a case where the principal and accessory are indicted and tried together are not admissible to prove the guilt of the principal, it is clearly opposed to the general course of decisions in criminal cases for centuries, and it is difficult to see why any different rule should prevail where the principal is first convicted, provided they are both joined in the same indictment. Many cases arise where criminal justice cannot be administered if the rule is as supposed by defendants. Take, for example, the case of an accessory in murder, where the principal is not upon trial because he pleaded guilty in the presence of the court and jury. Conviction of the accessory cannot take place without first proving the guilt of the principal, and his guilt cannot be shown without proving he committed the homicide with malice aforethought. Previous threats are the more usual evidence of malice in trials for murder, but if those are inadmissible then the accessory must be acquitted, however flagrant his guilt. . . . Malice aforethought is the characteristic criterion by which murder is distinguished from manslaughter, and many cases of secret homicide arise where there is no proof of antecedent threats or lying in wait; and in such cases resort is necessarily had to circumstances and frequently to the subsequent conduct and declarations of the prisoner to prove that material allegation of the indictment. Such evidence is clearly admissible against the principal when he is on trial, and if it is not admissible in the trial of the accessory to confirm the *prima facie* presumption resulting from the record of the principal's conviction in a case like the present, then there can be no such confirmation; which cannot be admitted."

Our statute provides that "an accomplice may be arrested, tried and punished before the conviction of the principal offender, and the acquittal of the principal shall not bar a prosecution against the accomplice, but on the trial of an accomplice the evidence must be such as would have convicted the principal." Penal Code, art. 89. In *Arnold's* case it was said, in discussing a similar question, "It being then necessary for the State to show the guilt of the principals, all legal evidence of whatever character is admissible. Therefore motives, threats and confessions of the principals, and in fact evidence from every legal source, is competent." 9 Texas Ct. App. 435. Another rule of law equally well settled, and which should not be overlooked in this connection, is that "deliberate confessions of guilt are among the most effectual proofs in the law, and that rule is applicable to the party who made the confession as well when he is tried with others as when he is tried alone." 1 Greenl. Ev. §§ 215, 233; Ros. Crim. Ev. 37, 52.

Now let us apply these rules and principles of law to the case before us. Appellant Simms was alone indicted and alone tried for the murder. Plummer, the alleged principal in the second count, if indicted, was not joined in this indictment,—was not being tried,—but on the contrary had turned State's evidence and was a principal witness on the trial against Simms. On the trial the prosecution was permitted to prove against Simms the acts, flight, declarations and confessions of Plummer after the homicide, and particularly certain statements made by him after his arrest and in the absence of Simms, which led to the finding of the gun with which he said the murder had been committed by Simms. As we have seen from the authorities quoted, such evidence might have been admissible and legitimate to prove Plummer's guilt, in only two aspects of the case: 1st. As confessions against himself had he been jointly indicted and tried, though not evidence even in that event against his confederates or co-defendants, because the offense had been consummated before these evidentiary facts and circumstances existed. 2d. They were admissible evidence to prove Plummer's guilt as a principal under the second count in which Simms was charged as his accomplice, because Plummer's guilt had first to be established as a condition precedent to Simms' conviction.

But Plummer not being on trial with Simms, and Simms being charged alone as a principal in the first count, no act, declaration, admission or confession of Plummer after the deed was committed was admissible as evidence against Simms on his trial upon the first count. Under one count the evidence was admissible; under the other wholly inadmissible. There was no way by which its opposite relation to the two counts could be reconciled. It must be manifest without further argument that the court should have compelled the election demanded by the defendant, and that in refusing to require the State to elect upon which count a conviction would be claimed a serious error was perhaps committed to the prejudice of the defendant.

Eight bills of exception were saved by defendant to the admission of testimony. Without discussing them *seriatim*, we are of opinion it is sufficient to classify them generally under two heads,—the evidence, outside the testimony of the accomplice Plummer, being almost entirely of a circumstantial character. We will, then, formulate the evidence under two heads: 1st. Circumstances which tended to throw light upon the transaction; and 2d. Confessions, statements and admissions made by other parties after the transaction and in the absence of this defendant. The former were clearly admissible; the latter clearly inadmissible. Under the former the court did not err in permitting Pete Williams to testify as to a conversation he heard between defendant and Avery with regard to a difficulty between the latter and the deceased, in which the defendant advised Avery that "night had no eyes." It was a circumstance, however slight, tending to show the feeling of defendant towards his brother, the deceased; and in cases depending wholly upon circumstantial evidence the mind seeks to explore every possible source from which any light, however feeble, may be derived. *Noftsinger* v. *State*, 7 Texas Ct. App. 301. And so with regard to the purchase of the gun by defendant at Jewett. With regard to this fact the evidence of the accomplice was legitimate; as was also the evidence of the merchant from whom it was purchased, tending to corroborate the accomplice. Nor was there any error in permitting Esquire Gregory to testify where he had found the gun, and that in drawing the load from the barrel which was not discharged he found wadding upon the load similar to that found by him in the yard of the deceased recently after the homicide. To this extent there is no objection to Gregory's testimony, though objectionable, as we shall presently see, in other respects.

In cases of circumstantial evidence, no definite line of demarcation can be drawn with regard to facts proximate and remote. The test is, do they tend to throw light upon the transaction? Greater latitude is allowed in the presentation of evidence where it is purely circumstantial than would be admissible where a conviction is sought upon direct and positive testimony. *Ballew* v. *State*, 36 Texas, 98. The necessity for admitting circumstantial evidence in criminal matters is even greater than in civil matters, and it is adopted the more readily in proportion to the difficulty of proving the fact by direct evidence, and because of the ease with which it can be disproved by the proof of other facts inconsistent with it.

Nor was any error committed in allowing Dr. Camp to testify to and reproduce the evidence given by the deceased witness, Wash Pollock, on the former trial. The witness fully qualified himself to do so. Whatever may have been the doctrine formerly held, it seems now well settled that the person called to prove what a deceased witness testified on a former trial is not required to repeat the precise words of such witness, but it is sufficient if the witness is able to state the substance of what was sworn on the former trial. 1 Greenl. Ev. 165; *Black* v. *State*, 1 Texas Ct. App. 368; *Dunlap* v. *State*, 9 Texas Ct. App. 179.

We are of opinion, however, that the court did err in permitting the witness Pete Williams to testify to the conversation between Avery and Plummer after the homicide and in the absence of defendant. No acts or declarations of theirs were evidence against this defendant under such circumstances.

It was also error to permit the confessions and declarations of Plummer, made after his arrest, to Squire Gregory and others, to be introduced against this defendant under the first count; and, if admitted under the second count, the jury should have been expressly charged that they would consider them only with reference to Plummer's guilt, and not as evidence of the guilt of defendant, except so far as his guilt was dependent upon the establishment in the first instance of Plummer's guilt. The charge nowhere limits the evidence to this object, and to that extent the charge failed to apply the law to the facts under the second count, and was insufficient.

Other matters assigned as error and discussed in the able brief and argument of counsel for appellant are not passed upon and decided, for the reason that they are not likely to arise again or become of any importance upon a future trial of the case.

For the errors pointed out and discussed in this opinion the judgment of the court below is reversed and the cause remanded for a new trial.

Reversed and remanded.

RALIEGH WHITE v. THE STATE.

1. NEW TRIAL.— By the Code of Procedure, article 777, all motions for new trials in criminal cases are subjected to the regulations which govern such motions in civil suits, Those regulations are well established and defined, and permit a new trial on account of newly-discovered evidence only when necessary to the ends of justice, and require diligence on the part of the applicant, and that the evidence be material and not merely cumulative. No indulgence is accorded to the negligent, and applications founded on slight circumstances will be promptly overruled. See the opinion *in extenso* on this subject.

2. SAME — PRACTICE.— The Code of Procedure, article 779, enacts that a new trial must be applied for within two days after the conviction,

but provides that "for good cause shown" in a case of felony the trial court may allow the application to be made at any time before the close of the term. This in effect confides to the judicial discretion of the trial court the determination of applications made after the expiration of two days; and therefore the exercise of that discretion will not be revised on appeal unless it has been abused to the appellant's prejudice.

8. **SAME — CASE STATED.**— Nearly a month after the appellant was convicted of burglary, he presented to the court below an application for a new trial based on newly-discovered evidence contradictory of the injured party's denial that appellant was his domestic servant. The trial court refused to allow the application to be filed, but the record shows that its merits were considered and passed upon, and nothing indicates an abuse of its discretion by the trial court. *Held*, that no error in the action of the court below is made apparent.

APPEAL from the County Court of Dallas. Tried below before the Hon. GEORGE N. ALDREDGE.

The indictment charged that the appellant, about three o'clock in the night of July 16, 1880, burglariously and by force broke into and entered the dwelling-house of F. P. Hord, with intent to commit theft. The jury found the appellant guilty and assessed his punishment at two years' confinement in the penitentiary.

F. P. Hord, the owner and occupier of the house in question, was the only witness introduced by the State. His testimony, though brief, was very much to the purpose. He stated that in the night, and about the hour alleged in the indictment, he was awakened by the outcry of one of his children who slept in the same chamber as himself. As witness raised himself up he saw some one escaping from the chamber into an adjoining room which was used as a kitchen and dining room. Witness instantly got his shot-gun and went into the kitchen, and there found the appellant trying to get out of the door. Witness leveled his gun and made the appellant take a seat, and guarded him until morning, when he took him to the city of Dallas and delivered him into custody. The witness did not see the appellant enter the sleeping-room, but stated that he must have done so through a window which was found open, though witness was confident that it had been closed the preceding evening. There were valuables in the sleeping-room, and witness found his pants on the floor in a different part of the room from where he left them when he went to bed.

On his cross-examination the witness denied that the appellant was or ever had been a domestic servant in witness' household. On the contrary, the appellant, at the time in question, was a tenant of witness, and lived in a house about seventy-five yards from the latter's residence.

The defense introduced no evidence at the trial, but, twenty-five days afterwards, applied for a new trial on account of evidence discovered since the conviction. The application and supporting affidavits were elaborate in setting forth the newly-discovered evidence relied on. It consisted in the testimony of two or three persons who, on sundry occasions, had casually seen the appellant at or about the house of the State's witness Hord, performing duties of a menial character.

W. B. Gano, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was tried and convicted in the court below, on November 11, 1880, of burglary. On December, 6, 1880, no motion for a new trial or in arrest of judgment having been entered, he was brought before the court, and, showing no sufficient reason to the contrary, was sentenced to confinement in the State penitentiary for two years, in accordance with the verdict of the jury. On December 9, 1880, application was made by counsel for the defendant for leave to file a motion for a new trial on account of newly-discovered testimony. The court, on considering the application, refused to permit it to be considered or to allow the motion to be filed. To this action and ruling of the court the defendant excepted and gave notice of appeal.

Whilst the motion for new trial was not permitted to be filed and considered as such, a bill of exceptions reserved to the ruling of the court shows the grounds of the motion, and accompanying affidavits disclose the testimony alleged to have been discovered since the trial, and how it was expected to obtain it, as well as the diligence employed in order to procure it at an earlier day. From these sources of information, and from the evidence adduced on the trial, we conclude that at least one, if not the principal, object to be attained by the new testimony was to discredit the State's witness who testified to the fact that the defendant was not a house-servant of the family occupying the house alleged to have been burglariously entered, by showing the fact to be that the defendant was a domestic servant of the family, and as such servant had a right to enter the premises at pleasure.

We are aware it has been held that a domestic servant of the person from whose house property has been stolen, could not be convicted of theft from a house, *eo nomine*, whilst there was by law such an offense, but, occupying a sort of confidential relation to the family and necessarily entitled to enter the house in order to perform the duties of a domestic servant, on proof of a theft having been committed could only have been convicted of simple theft, to which a milder punishment was fixed by law than to that of theft from a house. *Alston* v. *State*, 41 Texas, 39. Yet we fail to discover that the principle announced in that case has any application to the present inquiry.

By the State's witness it was proved that the defendant was a tenant of the witness, and lived about seventy-five yards from the residence of the witness where the burglary is charged to have been committed, and which house, agreeably to the testimony, is situated about three miles south of the city of Dallas. The State's witness further testified, on cross-examination, that the defendant was not a domestic servant of his or of the family at the time the offense was committed or at any other time, but was a tenant of the witness, cropping on shares. This much of the testimony against him was certainly known at the time of the trial, if not before, and it is unreasonable to suppose, if the facts were not as testified, that evidence could not have been procured to establish them at a much earlier day than as presented in the motion of the defendant. And further, when the defendant was arrested in the house of the witness in the darkness of night, it is hardly credible to suppose that, if he was in fact a domestic servant, habitually admitted into the house for purposes of his employment, he did not make himself known as such, or that he could not have called some member of the family, or some other tenant or employee about the premises, to show his relation to the family. But, no matter what his relations were, he had no right to enter the house under the circumstances disclosed by the State's witness, without the knowledge or consent of the occupants of the house.

Treating the motion for a new trial as though it had been filed and overruled, and giving the appellant the benefit of that view of the subject, and treating the subject in that light, we are of opinion that it would have been but an ordinary application for a new trial on the ground of newly-discovered evidence. Testing the motion as if it had been filed and overruled, if such had been the action of the court, there would have been no error in overruling the motion and refusing a new trial on the grounds and affidavits set out in and appended to the motion, and we conclude that there was no error prejudicial to the rights of the accused in the refusal of the court to permit the motion to be filed at the time and under the circumstances attending its presentation. The new testimony, if material, which is not seen, could certainly have been discovered at an earlier day than that disclosed by the motion, by the use of the most ordinary diligence. The rules governing motions for new trials on account of newly-discovered evidence ought not ordinarily to be attended with difficulty under Texas laws at this late day. The provision of the present Code of Procedure, article 777, clause 6, to the effect that motions for new trials on the ground of newly-discovered evidence are to be governed by the same rules as those which regulate civil suits, is but a re-enactment of clause 6, article 672, of the original Code of Procedure (Pasch. Dig. art. 3137), as follows: "Where new testimony material to the defendant has been discovered since the trial, a motion for a new trial based on this ground shall be governed by the same rules as those which regulate civil suits."

In *Shaw* v. *State*, 27 Texas, 752, it was said (the court quoting the language of the Code of Procedure) that a motion on this ground (newly-discovered testimony) is governed by the rules which regulate civil suits. It was said by this court in ***Bronson*** v. ***State***, 2 Texas Ct. App. 46, on this subject, that the correct doctrine is laid down by the court in *Shaw* v. *State*. Looking further into the doctrine as laid down in *Shaw's* case, 27 Texas, 750, it is found that the rules governing new trials as the ground of newly-discovered testimony are as deduced by Judge Sutherland in 5 Wend., cited in Graham & Waterman on New Trials, 498, which were adopted as expressing the views of the Supreme Court, and which are as follows: "It has been shown that there are certain principles in relation to such applications which are clearly settled and well defined by long continued practice and an uninterrupted series of decisions in our own and other courts. Those principles are: 1. That a party is bound and presumed to know the general leading points which will be litigated in his case. 2. That if he omits to procure evidence which with ordinary diligence he might have procured in relation to those points upon the first trial, his motion for a new trial for the purpose of introducing such testimony shall be denied. 3. If the newly-discovered evidence consists merely of additional facts and circumstances going to establish the same points which were principally controverted before, or of additional witnesses to the same facts and circumstances, such evidence is cumulative, and a new trial should not be granted. In cases to which these principles clearly and unquestionably apply, the granting or refusal of a new trial is not a matter of discretion. The parties have a legal right to a decision conformable to these principles. When there is doubt upon the point of negligence, or as to the character of the evidence, or as to its materiality, it becomes a matter of discretion, and the court will not, —perhaps I ought to say cannot, —rightfully interfere."

The rules thus laid down will be found on examination to be in precise accord with Graham & Waterman on New Trials, in the chapter which treats of the subject of granting new trials, "for newly-discovered evidence." Chapter 13, page 462. It is there said, under the head of "general remarks," and corresponding with the principles laid down in *Shaw's* case: "It sometimes happens that after the utmost diligence, and the best directed efforts of the party and his counsel, the true merits of the case have not been submitted by reason of the absence of facts which, had they been known and introduced, would have given a different complexion to the case; or it may be that facts have occurred subsequently to the trial which tend to present the point at issue differently, and to show that the verdict, if suffered to remain, would operate unjustly. When such a case happens, and the court becomes satisfied that, to promote the ends of justice, an opportunity ought to be allowed for the introduction of new testimony, it will furnish an opportunity by setting aside the verdict and directing a new trial. But, to prevent abuse, practicing with witnesses, careless preparation in the first instance, and harrassing the court with unfounded applications, the party moving on the ground of newly-discovered evidence is required to conform himself to very stringent regulations. The negligent are to expect no indulgence, and applications founded on light circumstances will be promptly denied. Nothing but a clear case of injustice, occasioned by means beyond the control of the party, and the certainty of correcting it by those means since brought to light and placed within the reach of the applicant, will answer the purpose. There is, therefore, no ground on which motions for new trials rest, better ascertained or more clearly defined, so as to guard against practice and imposition than that of newly-discovered evidence. By a series of well digested decisions, it is settled that the evidence which would warrant the court to set aside the verdict must be new, material and not cumulative, and that the party applying has used reasonable diligence." These authors cite Mr. Justice Woodworth, in *Porter* v. *Talcot*, 1 Cowen, 359, in laying down the essentials "with brevity and perspicuity," as follows: "The application for a new trial ought to be granted, on the ground that there has been reasonable diligence, that the new evidence is material, that it has been discovered since the trial, and is not cumulative." The rules laid down in *Shaw's* case and those laid down in Gra. & Wat. on New Trials are susceptible of easy reconciliation with the rules of Mr. Wharton, Crim. L. § 3161, and those of Mr. Archbold, in Arch. Crim. Pr. & Pl. 178–26, cited in *West* v. *State*, 2 Texas Ct. App. 209, and again in *Terry* v. *State*, 3 Texas Ct. App. 236.

See also *Boothe* v. *State*, 4 Texas Ct. App. 202; *Hutchinson* v. *State*, 6 Texas Ct. App. 468, and *Duval* v. *State*, 8 Texas Ct. App. 370.

By a proper application of these rules we are of opinion a new trial should have been refused even if it had been applied for within the two days, the time ordinarily allowed for motions for new trials. The application coming, as it did, nearly a month after the trial, we are of opinion the court did not err in refusing to permit it to be filed at all.

Counsel for the appellant in the brief argue that in felony cases a new trial may be applied for at any time during the term of court at which the trial was had. This is in one sense true. The language of the Code is, "A new trial must be applied for within two days after the conviction, but, for good cause shown, the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was had. When the court adjourns before the expiration of two days from the conviction, the motion shall be made before the adjournment." Code Crim. Proc. art. 779; Pasch. Dig. art. 3136. There is but slight difference between the phraseology of the present Code in this respect, and that employed before the late revision. That portion of the article which declares that a new trial must be applied for within two days after the conviction, seems to apply as well to felony cases as to misdemeanors, and seems to be mandatory in cases of misdemeanor. That portion which authorizes an application for a new trial in felony cases to be made at any time before the adjournment of the term, by the very language employed indicates very clearly that such an application, when made after the expiration of two days, addresses itself to the sound discretion of the court before which the application is made; *for good cause shown*, the application may be made. Necessarily the court to whom the application is made out of the regular time must determine whether the cause shown is good or not. Who can determine so well as to the sufficiency of the *cause shown* for permitting the application to be made out of time, as the court before whom the trial was had? In all matters where a discretion is confided to the trial courts to do or not to do a particular thing, it has heretofore not been the practice of this court to interfere unless it be made to appear that the discretion confided to the court below had been improperly exercised, and that too to the prejudice of the party against whom the ruling was made. We see no reason to depart from this rule in cases like the one under consideration. *Linn* v. *LeCompte*, 47 Texas, 440.

We have considered the several objections urged against the charge of the court, but have not discovered any principle of law incorrectly enunciated, or any direction given to the jury which was not applicable to the evidence or calculated to confuse or mislead the jury in applying the law of the case to the facts proved. The material question for our consideration is the refusal of the court to permit an application for a new trial to be filed at the time and under the circumstances disclosed in the defendant's bill of exceptions.

There may doubtless be cases where the court on appeal would be warranted in revising the ruling made by the court below, where the matter is not solely confided to the trial court. *Railway Co.* v. *Forsyth*, 49 Texas, 171. In such a case the action may unquestionably be revised. If the trial court should in this or any other matter abuse the discretion confided to it and the party is prejudiced thereby, this court would feel called on to revise the ruling; and, if the discretion had been abused to the prejudice of the party, and injustice been done or the law improperly administered, would feel called on to set the action aside. Such, however, is not the present case. The material defect in the defendant's application consists in the immateriality of the new evidence sought to be obtained, and in the palpable want of diligence in not bringing it to light at an earlier day of the term.

We find no material error in the proceedings, and the judgment is affirmed.

Affirmed.

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WILLIAM RIVERS *v.* THE STATE.

1. INFORMATIONS — SURPLUSAGE — CASE STATED.— Information charges that appellant did "wilfully wound a hog, the same being the property of *him the said* H. S., contrary," etc. The name of H. S. nowhere else appears in the information. *Held,* that the words "him the said" may be eliminated as surplusage.
2. MALICIOUS MISCHIEF — INFORMATION that charges the wounding of "a hog" sufficiently describes the animal, as that term is included in the term "swine" as used in the statute.
3. SAME.— An information for the wilful wounding of an animal enumerated in the statute need not further allege that it is a "domesticated animal."
4. AN AFFIDAVIT of a person who had been convicted of a felony, and who, unpardoned, had served a term in the penitentiary, is incompetent as the basis of a criminal prosecution. See the opinion *in extenso.*
5. EXECUTIVE PARDON — RESTORATION OF CIVIL RIGHTS.— It is only in cases of conviction for perjury or false swearing that a charter of pardon must specifically restore the competency of the convict to testify in courts of justice. In all other cases of felonious convictions, a general pardon effectuates the restoration of competency to the convict, and makes his affidavit a sufficient basis for a criminal prosecution. See the opinion for a charter of pardon *held* to be a general pardon.
6. JUDGMENT — VERDICT — VARIANCE.— The variance is material when it appears that the judgment imposed a more severe penalty than that assessed by the verdict of the jury. But the judgment may be reformed by this court.

APPEAL from the County Court of Walker. Tried below before the Hon. J. M. SMITHER, County Judge.

The opinion sufficiently discloses the case.

Wynne & Brown, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The information charges that "William Rivers did, in the aforesaid county and State, wilfully wound a hog, the same being the property of *him the said* Harvey Stoneham, contrary," etc. The affidavit of Harvey Stoneham, upon which it is based, is attached to and made part of the information, but Stoneham's name had not been mentioned in the information until as used above, to wit, "of *him the said* Harvey Stoneham." If the words "him the said" be eliminated as surplusage, which is permissible, then the information is unobjectionable under art. 680 of the Penal Code, which reads, "if any person shall wilfully or wantonly kill, maim, wound, disfigure, poison or cruelly or unmercifully beat and abuse any animal or bird included in the preceding article, he shall be fined not exceeding two hundred and fifty dollars." The preceding article (art. 679) makes it an offense "to kill, etc., any horse, ass, mule, cattle, sheep, goat, swine, dog or other domesticated animal," etc.

A motion to quash made by defendant was overruled. From the grounds set forth in the motion we infer that the counsel must surely have been laboring under the belief that the information was brought under art. 685 of the Code, since the objections urged were manifestly with reference to the provisions of this latter article. Such was not the case, as we have seen above. In another motion to quash the information the objection urged is, "Because said information does not state that said hog alleged to have been wounded was a domesticated animal, as required by arts. 679 and 680 of the Penal Code."

It is not necessary to allege that any of the animals named in art. 679 should be further described as "domesticated animals." To injure any of the animals named is an offense, and besides those specifically named the statute makes it an offense to injure any "other domesticated animal" not named. This is what is meant by "or other domesticated animal,"—some other domesticated animal than those mentioned. "Hog" is included in and synonymous with the term "swine" used in art. 679, and to allege the wounding of "a hog" is a sufficient description of the animal. *Duval* v. *State,* 8 Texas Ct. App. 370; *Robertson* v. *State,* 1 Texas Ct. App. 312. As to the change in the wording of the present from that of the old statute defining this offense, see *Rountree* v. *State,* decided at the present term. *Ante,* p. 110.

Other objections were made to the complaint and to the complainant when he was offered as a witness for the State. It was objected to the complaint or affidavit that Stoneham, the affiant, had been convicted of a felony, had served a term in the penitentiary, and was consequently infamous and incompetent to testify under the law (Code Crim. Proc. art. 730, subdivision 5), and that, being incompetent to testify, he was incompetent to make an affidavit upon which to institute a criminal prosecution. This doctrine is not without ample authority to support it. In *Walker* v. *Kearney,* 2 Strange's Eng. R. 1148, it was held that the affidavit of one convicted of forgery could not be read to support a complaint. The court say, "if he cannot be a witness in a civil suit where a third person is interested in his evidence, *a fortiori,* he shall not be received here." And the same rule once prevailed with reference to affidavits of Quakers in support of a criminal charge. *Rex* v. *Gardner,* 2 Burrow's Eng. R. 1117.

Mr. Greenleaf says, "In regard to the extent and effect of the disability thus created (by conviction for felony), a distinction is to be observed between cases in which the person disqualified is a party and those in which he is not. In cases between third persons his testimony is universally excluded. But where he is a party, in order that he may not be wholly remediless, he may make any affidavit necessary to his exculpation or defense, or for relief against an irregular judgment, or the like; but it is said that his affidavit shall not be read in support of a criminal charge." 1 Greenl. Ev. § 374. Mr. Bishop says of such convicts, "they are supposed to be so regardless of truth that it would be unjust to compel a person litigant to suffer from what they might assert, even under oath. Yet, if the parties themselves are in this situation, they are usually allowed to make the same affidavits in their causes as other men are, for such affidavits are always against the general policy of the law, and are permitted only from necessity, for the sake of convenience, and for the dispatch of business,—reasons which apply as well where the party is infamous as where he is not." 1 Bish. Crim. Law (4th ed.), § 743.

To the general rule that a convict's affidavit cannot be read in support of a criminal charge, Mr. Wharton endeavors to establish an exception. He says: "But the same principle which makes a wife admissible against her husband, in cases of violence committed on herself, would render the convict competent to obtain redress for personal injury, when no other evidence could be obtained." Whart. Crim. Ev. (8th ed.) § 364. We cannot concur in this doctrine, and he cites no authority supporting it.

In the case before us, however, when the defendant interposed the objection that the affiant and witness, Stoneham, was a convicted felon, the prosecution produced a charter of pardon for the witness, as follows, viz.:

"Proclamation by the Governor of the State of Texas.

"To all whom these presents shall come: Whereas, at the February term, 1878, in the District Court of Montgomery county, State of Texas, Harvey Stoneham was convicted of the theft of an ox, and sentenced to the penitentiary for two years: Now, therefore, I, O. M. Roberts, Governor of Texas, in consideration of the fact that said convict voluntarily went into service in the penitentiary before his appeal was decided, do, by virtue of the authority vested in me by the Constitution and laws of this State, hereby pardon the said Harvey Stoneham, the same to take effect two years from the time that he commenced said service in the penitentiary,— two years being the length of his sentence. In testimony whereof I have hereto signed my name and caused the seal of the State to be affixed, at the city of Austin, this 8th day of April, A. D. 1880. (Signed.)

[Seal] "O. M. ROBERTS, Governor of Texas.

"By the Governor:

"JOHN D. TEMPLETON, Secretary of State."

The position assumed and insisted upon is that this pardon is not a full pardon or pardon for the crime of which the witness was convicted, but that it was a mere indulgence granted the prisoner on the part of the executive, in remitting or commuting the term of his imprisonment; and that nothing but a pardon for the crime itself, so expressed in terms in the charter, could restore competency to the witness. In the language of the statute, amongst those incompetent to testify in criminal cases are "all persons who have been or may be convicted of felony in this State, or in any other jurisdiction, unless such conviction has been legally set aside or unless the convict has been legally pardoned for the crime of which he was convicted." Code Crim. Proc. art. 730, subdiv. 5.

"A pardon may be full or partial, absolute or conditional. . . . When the pardon is a full one, its collateral and consequential legal effects cannot be abridged by any language employed in it; for they must be determined by the law of the land. If it is a conditional pardon, the condition may be precedent or subsequent; if precedent, that is if by its terms some event is to transpire before it takes effect, its operation is deferred until the event occurs. If the condition is subsequent, the pardon goes into effect immediately, yet becomes void whenever the condition is broken." 1 Bish. Crim. L. (4th ed.) § 760. "The effect of a full pardon is to absolve the party from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." *Id.* § 762. "A full pardon granted after the convict has suffered the entire punishment imposed upon him by his conviction removes the common law disability of incompetency as a witness." *State* v. *Blaisdell,* 33 N. H. 388; 1 Greenl. Ev. § 377.

In the case of *The People* v. *Pease,* 3 Johns. Cas. 333, it was held that if the pardon of one sentenced to the penitentiary for life contains a proviso that nothing therein contained shall be construed so as to relieve the party from the legal disabilities consequent upon his sentence other than the imprisonment, the proviso is void, and the party is fully rehabilitated." On the other hand, whilst "a pardon of one convicted and sentenced for an infamous offense restores his competency as a witness, a remission merely of his punishment does not restore his competency." *Perkins* v. *Stevens,* 24 Pick. 277. It is only in cases of perjury or false swearing that the pardon is required under our statute to state specifically by its terms that it restores the convict's competency to testify in a court of justice. Code Crim. Proc. art. 730, subdiv. 5. In all other cases the general pardon restores the competency.

We are of opinion that the instrument before us was a general pardon, to take effect at a certain time mentioned. At the expiration of the time, the pardon became full, complete and absolute, and the party became rehabilitated in all his rights.

The only remaining question is one of variance between the verdict and judgment. The verdict finding the defendant guilty imposed as his punishment a fine of one dollar. Judgment was rendered against him for a fine of ten dollars and costs. It is true that, under the general power conferred by statute, this court might reform and correct the judgment (Code Crim. Proc. art. 869); but, in view of the new evidence which defendant claims to be accessible if a new trial is awarded him, and also upon the ground of variance, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

MARION CHILDS v. THE STATE.

1. NEW TRIAL — PRACTICE.— By the Revised Code of Procedure, article 781, the State is now enabled to take issue on the causes assigned for a new trial by the defense, and in determining the issue the trial judge is required to hear evidence "by affidavit or otherwise;" and this authorizes him to receive oral proof.
2. NEWLY-DISCOVERED EVIDENCE — DILIGENCE.— Want of diligence in the discovery of evidence by the defendant is not excused on account of his confinement in jail, unless it be further shown that he had no one outside to render him the necessary assistance.
3. NEW TRIAL.— By the Code of Procedure, article 777, new trials in felony cases are positively interdicted for any cause other than those specified in the same article. Surprise occasioned by the testimony of a witness is not among the causes specified, and therefore is not cause for a new trial.
4. SURPRISE resulting from unexpected testimony may, notwithstanding the trial is in progress, be cause for the continuance of the case or a postponement of the trial, provided the motion therefor is opportunely interposed.

APPEAL from the Criminal District Court of Galveston. Tried below before the Hon. GUSTAVE COOK.

The indictment charged the appellant with an assault upon one Bell Faulkner, on September 19, 1880, with intent to murder, etc.

Faulkner, it appears, engaged in a squabble and slight scrimmage with his wash-woman, and she summoned to her assistance her youthful son, who appeared at the scene accompanied by the appellant. A general quarrel ensued between Faulkner on the one side and the lady, her son and the appellant on the other. According to Faulkner's evidence, the appellant advanced upon him with an open pocket-knife, and he picked up a piece of scantling to defend himself. After more quarreling, Faulkner turned and walked off a little distance and stopped to talk with a female friend, when the appellant attacked him from the rear and cut him severely with his knife. Another witness for the State gave the same version of the facts.

The wash-woman and her son, testifying for the defense, stated the matter differently. According to them the appellant was menaced by Faulkner with the stick before he resorted to his pocket-knife.

John Lovejoy, for the appellant.

O. S. Eaton, Acting Assistant Attorney General, for the State.

Winkler, J. This is an appeal from a conviction of an assault with intent to murder, the punishment imposed being confinement in the State penitentiary for two years. After the trial and conviction, the defendant moved for a new trial on two grounds; 1, newly-discovered testimony, and 2, surprise in being deceived by the testimony of one of his own witnesses, who, it is alleged, had induced him to believe he would have sworn differently from what he testified to on the trial. These being the grounds of the motion, the court below on hearing the motion heard the evidence of the persons whose affidavits were offered in support of the motion for a new trial, as well as that of other witnesses, and overruled the motion.

There is a new provision of the Code of Procedure, in regard to procedure on applications for new trials, which is as follows: "The State may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial, and in such case the judge shall hear evidence, by affidavit or otherwise, and determine the issue." Code Crim. Proc. art. 781. Under the provisions of this article, the court was authorized to hear evidence in determining whether to grant a new trial or not. *Reynolds* v. *State,* 7 Texas Ct. App. 516; *Rucker* v. *State, id.* 549.

As to that feature of the motion for a new trial based on the ground of newly-discovered evidence, we are of opinion the application was insufficient in two particulars,— diligence and materiality. *White* v. *State,* decided at the present term of the court, and the rules of law governing new trials on the ground of newly-discovered evidence there collated (*ante,* p. 167); *Thomason* v. *State,* 2 Texas Ct. App. 550, and cases cited. The fact that the defendant has been confined in jail will not excuse a want of proper diligence in preparing for a trial, unless it be shown that he had no one not so confined who could have rendered the necessary assistance. *Thomason* v. *State,* cited above.

As to that portion of the motion for a new trial which is based on the ground of surprise at the testimony of one of the witnesses, it is sufficient to say that, whilst the law has made provision for such a contingency, the remedy afforded is not by granting a new trial, this not being embraced within the grounds for which a new trial will be granted. The Code has prescribed the grounds upon which new trials may be granted, and, except on those enumerated, it is declared new trials shall not be granted. Code Crim. Proc. art. 777.

When the surprise occurred, the defendant should have applied for a continuance or a postponement of the trial. The Code of Procedure declares that "a continuance may be granted on the application of the State or defendant after the trial has commenced, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had; or the trial may be postponed to a subsequent day of the term." We do not undertake to say that the surprise here complained of would have been sufficient to have warranted a continuance of the case or a postponement of the trial; but, if this were so, then it became the duty of the defendant to apply to the court for either a continuance or postponement, and not to pass it by and depend upon a new trial to enable him to counteract the effect of the surprise. He should have acted at the time and in the manner prescribed by law, and not having done so, he cannot now be heard to complain. Code Crim. Proc. art. 568; *Higginbotham* v. *State*, 3 Texas Ct. App. 447; *Walker* v. *State*, 7 Texas Ct. App. 245. There was no error in overruling the defendant's motion for a new trial. This being the error specially complained of, and finding no other error in the proceedings, the judgment must be affirmed.

Affirmed.

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J. D. LONG *v.* THE STATE.

1. POSSESSION OF COUNTERFEITING MATERIAL — INDICTMENT.— The offense of having in possession moulds and material used in counterfeiting current coin, with the intent to so use them, as defined by the Penal Code, article 464, is an offense separate and distinct from the offense of counterfeiting as defined by article 469 of the Code, and hence, an indictment for the first offense should not charge the constituent elements of the latter. See the opinion *in extenso* for an elaboration of the question.

2. EVIDENCE.—As a standard of. comparison to prove handwriting, the witness adopted a letter to himself purporting to be from one W., a penitentiary convict, the authorship of which letter was subsequently acknowledged by W. It was objected that the admission of W., he being a convict and thereby rendered infamous and incompetent as a witness, was incompetent to qualify the letter as a standard of comparison; which objection was overruled. *Held*, error; and that no fact stated by or derived from a convict, can, so long as the disability remains, be detailed as testimony by another, or used as evidence against a third party for any purpose.
3. SAME.—To the admission of the testimony of the officials of the penitentiary to the effect that certain convicts in their custody, to whom the accused had access, were convicted for counterfeiting, the defense interposed the objection that the best evidence was the record of their conviction. *Held*, that, inasmuch as the officials had them in charge by legal process certifying their conviction, and they not being in possession of the record evidence, it was competent for them to state the offense of which the convicts had been convicted, as certified to them. And *held* further that this evidence was merely of a collateral fact involved in the investigation.
4. SAME.—A receipt found upon the person of the accused, and purporting to designate the ingredients of a compound suitable for counterfeiting purposes, was properly admitted in evidence; and the trial court did not err in permitting experts to testify that the composition thus formed would produce a material used in counterfeiting silver coin.
5. NEW TRIAL—CASE STATED.—A juror on his *voir dire* disclaimed bias or prejudice, or any conclusion as to the guilt or innocence of the accused; but it is shown by the affidavits of two jurors that, before the jury was fully empaneled, he said to them that "he was a poor juror for the defendant;" and by the affidavits of the accused and his counsel that these facts were unknown to them until after the trial, and further that the defense had not exhausted its challenges when the jury was completed. The counter-affidavit of the impugned juror sets up that he was not biased or prejudiced against the defendant, and had not, when he qualified himself, formed any conclusion as to his guilt or innocence, but does not deny or explain the remarks imputed to him. *Held*, sufficient ground for new trial.

APPEAL from the District Court of Walker. Tried below before the Hon. W. A. WOOD.

The indictment charged that the appellant, in Walker county, on the 5th day of January, 1880, had in his "possession a mould adapted for making coin, with the intention of committing the offense of counterfeiting, and with the intent to use said mould for the purpose of counterfeiting the silver coin of the United States, of the value and denominations of one dollar; contrary," etc.

His trial resulted in conviction, and the punishment assessed was confinement in the penitentiary for the period of two years.

J. M. Parish testified for the State that, in January, 1880, he was deputy sheriff of Walker county. The justice of the peace, Mr. Williams, placed a search warrant in his hands and directed him to search the room and person of the accused. The witness found the accused in the yard of the penitentiary building, and upon searching his person found in the inside pocket of his vest a mould made of plaster-of-Paris. The mould was closed when the witness first got possession of it, and was opened the next day on the examining trial held by Justice Williams. The witness opened it with a knife. It had in it a legal tender silver coin dollar of the United States. A white mould, fitting closely around a silver dollar when closed, each half of the mould having a distinct impression of letters, figures, lines, etc., corresponding with those on the sides of a United States legal tender dollar, was here shown to the witness, and identified by him as the mould which he found on the person of the defendant. After taking this mould from the person of the defendant, the witness went to the room of defendant and broke open his trunk, which was locked, finding in it the piece of metal exhibited. It is a piece of very fine grained Babbitt's metal. They also found in the trunk the paper now shown him, which was a formula or recipe.

The witness had marked this paper "A., Jan'y 7," for the purpose of identifying it in the examining court. The witness also found in the trunk the packages now exhibited to him; that marked B. containing a small quantity of white powder; that marked C. containing a small quantity of white powder, and that marked D. containing six coins. The witness had seen some "right good coins made of Babbitt's metal. Such metal was much used about the penitentiary."

On cross-examination the witness stated that, when he told the accused that he was going to search his trunk, the accused did not object. The witness had never seen counterfeiting done, did not know that money could be made with the moulds taken from the person of the accused, but believed that it could.

L. P. Davidson, for the State, testified that in January, 1880, he was a druggist and chemist, doing business in Huntsville, Walker county, Texas. Two or three days before the examining trial of the accused, he came to the witness' drug-store and purchased four and one-half ounces of plaster-of-Paris. The mould identified by Parish being exhibited to the witness, he testified that it was made of plaster-of-Paris. The amount of plaster-of-Paris sold by witness to accused was amply sufficient to make a mould of the size of the one exhibited. The package marked B. was then handed to witness, and he pronounced the contents plaster-of-Paris, and was certain that the paper enclosing it was the same paper in which he wrapped the plaster-of-Paris he sold the accused. The paper marked C. was handed witness and he stated that he believed the contents to be sulphate of potash. Sulphate of potash is used in making Dover's powders, but witness did not know its mechanical uses. Plaster-of-Paris is used generally for making moulds.

J. F. West testified for the State that he was an engineer by profession. The piece of metal identified by Parish was handed him and he pronounced it Babbitt's metal. The witness was present when the mould was taken from the person of accused, but was not present when his trunk was opened. The accused was a night-guard in the east building of the penitentiary, and had charge of Little and Curtis, who were under sentence for counterfeiting. He had charge also of a convict named Weaver, who was a cell-mate of one Hale, convicted of counterfeiting. The witness was under-keeper at the time, and had charge of the discipline of the prison.

Cross-examined, the witness said that he had taken some powder like that exhibited in court from Little's coat. A few days before that the defendant asked permission to have a convict open his trunk, stating that he had lost his keys.

Haywood Brahan testified for the State that in January, 1880, the defendant was night-watch in charge of the east building of the penitentiary, and as such had opportunities to confer with convicts who could make moulds like that exhibited in court. The witness was not present when the mould was found on the defendant's person, but was present when the trunk was opened by Deputy Sheriff Parish. The trunk had a spring lock, and a key was in it, but the lock had to be taken off to get the trunk open. The metal shown witness, the same identified by Parish, is Babbitt's metal. The difference between this and block tin is that the metal is easier worked. The witness had heard that Babbitt's metal is used in counterfeiting, but did not know of his own knowledge. There are many convicts in the penitentiary for counterfeiting, and some for having in their possession moulds for counterfeiting. As night-guard, the defendant had access to all of the convicts in the east building every night.

Cross-examined, the witness said there was one convict in the penitentiary sent for having moulds in his possession, who was "knocking about on the inside of the walls."

T. J. Goree, for the State, testified that he was, and had been for several years, superintendent of the Texas

State Penitentiary. The defendant had been a night-guard in charge of the east building for several months next preceding the 6th day of January, 1880. During the defendant's service there were in the east building three convicts sent for counterfeiting and dealing in counterfeit money. While defendant was night-guard, he was the only citizen who had access to the convicts in the east building from dark until daylight. The paper marked "A. Jan'y 7" was shown to witness, and he testified that he believed he knew in whose handwriting it was written. All letters to and from convicts were required to pass through the witness' hands. The witness had never seen Frank Weaver write, but from seeing letters purporting to have been written by him in reply to letters received by him, and from notes to the witness purporting to have been written by him and afterwards spoken of by him (Weaver) as notes he had written, the witness was satisfied that this paper marked "A., Jan'y 7" was in Weaver's handwriting. It is signed "H. & W. & Co." Just before the arrest of the accused (Jan'y 6, 1880), and for some time before that date, Weaver had been a cell-mate of a man named Hale, who was confined for counterfeiting. On Monday, January 5, 1880, before the arrest of the defendant, and while in charge of the east building, some convicts escaped from their cells in that building, and among the number were Weaver and Hall. The convicts were recaptured.

After the escape of Weaver, a letter was found addressed to the witness purporting to have been written by Weaver. Weaver afterwards spoke to the witness about the contents of this letter, and spoke of it as having been written by him. That letter and the paper marked "A., Jan'y 7" are in the same handwriting.

L. B. Hightower, for the appellant. The first assignment of error relates to the admission of the testimony of L. J. Goree as to the handwriting of the convict Weaver. Goree testified that, from seeing letters purporting to be written by Weaver, and which Weaver afterwards admitted to be written by him, the receipt was in Weaver's handwriting. We submit that the witness was not qualified to testify as to the handwriting.

It does not help the case to say that Weaver admitted writing the letters from which the witness Goree derived his knowledge. Weaver was a convict, and no testimony or admission of his could be used in evidence against appellant Long. Because to allow such testimony would destroy the well-known rule that a felon cannot testify. In this case the court admits Weaver's statement to be used in evidence against defendant, even when the same was not made under oath.

The second assignment complains of the admission in evidence of a certain receipt. The court says, in approving our bill of exception, that the receipt was admitted as a circumstance. We submit that it could be no circumstance, because it was in no manner connected with the case at bar by any sort of testimony. A cure for chills and fever might just as well be admitted as a circumstance, and yet the State's counsel were allowed to argue that this receipt was for making counterfeit coin, when there was not a word of testimony to that effect. Certainly the rules of evidence were intended for some purpose.

The third assignment is for overruling the motion for a new trial. We ask this court to examine our motion, and then say if the juror Gillespie was not an incompetent juror. He had answered on his *voir dire* that he had formed no opinion as to the guilt or innocence of the defendant; that he had no bias or prejudice. That was our only way of testing the juror, and yet, before the sworn answers had died from his lips, he tells two men that he "is a bad juror for the defendant," and argued with one as to the guilt of defendant. If he was a "fair and impartial juror," then there are no unfair or partial jurors. We ask a careful examination of our motion for new trial.

Our fourth assignment, relating to the sufficiency of the indictment on motion in arrest, we think fatal to the State's cause. The court will perceive that the indictment is for having in possession moulds with the intent of counterfeiting. Now, counterfeiting is not defined in the indictment. The statute under which the indictment is drawn is exactly similar to the statute for burglary with intent to commit theft. (Penal Code, arts. 464 and 704.) Now, an indictment for burglary with intent to commit theft must contain a full description of the crime of theft; must, in other words, describe theft in "plain and intelligible words." The entry of the house constitutes no crime, without the intent to steal. So in this case, having the moulds is no crime, but having them with the intent to counterfeit is a crime. Then why should not the indictment define counterfeiting as burglary indictments define theft? This point has been well settled in numerous decisions.

It will not do to say that in an assault to murder it is not necessary to define murder, because in the assault the crime is committed, and the intent to murder is an aggravation of the crime which is contained in the assault, and there can be a crime well described without murder making a component part of that crime. In burglary, and in the case at bar, there exists an obvious difference. In burglary with intent to steal, theft is absolutely necessary to make out the crime. Without the intent to commit theft there can be no crime. So in having moulds in possession, without the intent to counterfeit, there can be no crime. Counterfeiting is a *sine qua non* to the offense sought to be charged in the indictment in this case. Without the intent to counterfeit there can be no crime.

Then is it not absolutely requisite in the indictment to define and describe counterfeiting? If not, then we can use technical expressions in the charging part of an indictment with impunity, and laugh at the statute which requires the offense to be stated "in plain and intelligible words."

Horace Chilton, Assistant Attorney General, for the State, filed an able brief.

WHITE, P. J. The indictment in this case charges that "J. D. Long, in the county of Walker in the said State, on the fifth day of January in the year of our Lord eighteen hundred and eighty, did then and there have in his possession a mould adapted for making coin, with the intention of committing the offense of counterfeiting, and with the intent to use said mould for the purpose of counterfeiting the silver coin of the United States of the value and denomination of one dollar," etc. This indictment was brought under an article of the Penal Code which reads thus: "If any person, with the intention of committing the offense of counterfeiting, or of aiding therein, shall make or repair, or shall have in his possession any die, mould, or other instrument whatever, designed or adapted or usually employed for making coin, or shall prepare or have in his possession any base metal prepared for coinage, with intent that the same may be used for the purpose of counterfeiting, he shall be punished by imprisonment in the penitentiary not less than two years nor more than five years." Penal Code, art. 464.

In the motion in arrest of judgment, the indictment was controverted as to its sufficiency in the description of the offense because it failed to allege the ingredients, elements, or constituents of the crime of counterfeiting, which is defined in the statute as follows, viz.: "He is guilty of counterfeiting who makes, in the semblance of true gold or silver coin, any coin of whatever denomination, having in its composition a less proportion of the precious metal of which the true coin intended to be imitated is composed than is contained in such true coin, with the intent that the same should be passed in this State or elsewhere." Penal Code, art. 459.

It will be seen that the indictment follows the language of the particular article (art. 464) upon which it is based. As a general rule this is all that is required in testing its sufficiency. Clark's Cr. Laws of Texas, p. 420 and note. But it is contended that this is not sufficient. We are inclined to believe otherwise. We do not think the pleader was required to aver in the indictment the constituents of counterfeiting. Defendant was not charged with counterfeiting. There is no analogy, as is claimed by defendant's counsel, between this and the crime of burglary. In the latter it is necessary not only to charge the burglarious entry but the particular felony also which the party intended to commit, because simply to charge that the entry was to commit a felony would not sufficiently and certainly apprise the defendant of what he was called upon to answer. The crime here charged is more nearly allied by analogy to assault with intent to murder; in which case it has never been held that murder should be defined, nor that the indictment should set out the constituents of that offense. *Mastin* v. *State*, 40 Texas, 19.

"According to the rules of pleading it is sufficient in an indictment to pursue the very words of the statute, if by so doing the act in the doing of which the offense consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity." *Bigby* v. *State*, 5 Texas Ct. App. 101; *McFain* v. *State*, 41 Texas, 385. At one time a statute in every material respect similar to the one upon which this indictment is founded existed in Massachusetts, and in a case arising under it Ch. J. Shaw says: "The object and policy of the statute we think obvious. It is manifestly so difficult to prove the fact of actually making counterfeit coin, that the statute intended to make the possession of instruments adapted to counterfeiting, with the criminal intent to use them, or cause or permit them to be used for that purpose, a crime subject to severe punishment. But the gist of the offense is the criminal intent, and therefore, the fact of the possession of such an instrument being proved, the intent was rightly left to the jury. . . . It (the statute) was intended to declare the possession of any instrument fitted and adapted for counterfeiting a crime if intended to be used for a criminal purpose." *Comm.* v. *Kent*, 6 Metcalf, 221. In that case both the indictment and the statute are set forth, and upon a comparison with the indictment before us and our statute, it will be found that they differ in no essential particular. In that case it was held that the statute offense was well stated and charged in the indictment. The indictment in *Kent's* case may also be found in 1 Whart. Precedents of Indictments (3d ed.), 353. Under a similar statute in Ohio, Mr. Wharton also furnishes us the form of a valid indictment, which is in no respect materially different from the one in this case. 1 Whart. Precedents of Indictments (3d ed.), 325. And so also the Virginia form for an indictment of the same character. 1 Whart. Precedents, 344.

We hold that these authorities are conclusive as to the validity and sufficiency of the indictment, and that the court did not err in overruling the motion in arrest of judgment upon this ground.

A bill of exceptions was reserved to the testimony of the State's witness, Goree, establishing the handwriting of Weaver. Weaver was a convict in the penitentiary. Goree had received a letter purporting to have been written by Weaver, and subsequently Weaver spoke to him about the contents of the letter, and admitted that he had written it. Ordinarily this would, it seems, have been sufficient to qualify Goree to testify as to the handwriting of Weaver, by comparison, taking this letter as a basis of comparison. For, Mr. Greenleaf says: "One mode of acquiring a knowledge of handwriting is from having seen letters, bills, or other documents purporting to be the handwriting of the party, and having afterwards presumably communicated with him respecting them, and acted upon them as his; the party having known and acquiesced in such acts founded upon their supposed genuineness." 1 Greenl. Ev. § 557; *Haynie* v. *State*, 2 Texas Ct. App. 168.

But it is insisted that the admission of Weaver that he wrote the letter to Goree which the latter made the basis for his comparison of the handwriting thereof with the receipt found in possession of the defendant, as evidence was wholly inadmissible because Weaver was a convict, and no testimony or admission of his could be used as evidence against defendant, his conviction for felony having rendered him infamous and utterly incompetent even to testify under oath. We are of opinion the objection to the testimony was well taken and should have been sustained. The object and purpose of the law is to render a convicted felon incompetent to testify in any case. If he cannot testify in person, how can he state facts to others and thereby enable them to testify to matters wholly derived from him? To permit this would be to abrogate the law which, as a part penalty for his crime, renders him forever incompetent to testify and forever unworthy of belief. No fact stated by or derived from him, can, so long as the disability remains, be detailed as testimony by another or used as evidence against a third party for any purpose.

The first bill of exceptions was saved to the testimony of officials of the penitentiary, who stated that certain convicts to whom defendant had access were convicted for counterfeiting,— the objection being that the best evidence of that fact would be the record of their conviction. Such ordinarily would be the case. But in this instance we are of opinion that the officials, having these convicts in charge and being charged with their custody by legal process certifying their conviction, and not being in possession of the record evidence or required by law to have it, could state the offense of which they had been convicted as the same had been certified to them. Besides, the fact of the conviction of these parties for counterfeiting was a mere collateral matter, and only a circumstance in connection with all the other evidence, pertinent to go to the jury in explanation of the fact of defendant's having counterfeiting materials in his possession, and the probable intent and purpose of his possession.

Nor did the court err in allowing the prosecution to introduce in evidence the receipt found upon the person of defendant, and permitting experts to testify that the composition formed in accordance with the receipt would produce a material used in counterfeiting silver coin.

One ground of the motion for new trial was that one of the jurors, W. O. B. Gillespie, after having been tested upon his *voir dire*, and though examined as to his bias or prejudice against defendant, had stated that he had none and had formed no conclusion on the question of his guilt or innocence, yet was in fact prejudiced and had formed an opinion against defendant, as was evidenced by a remark made by said juror to two fellow-jurymen before the jury was fully impaneled, to the effect that "he was a bad juror for defendant." This ground of the motion is supported by the affidavits of the two jurors to whom the remark was made, and also the affidavits of the defendant and his counsel that these facts were unknown to them until after the trial, and further that in accepting the jury the defendant had not exhausted his challenges when it was completed. The State produced the counter-affidavit of the juror Gillespie, to the effect that he was not biased or prejudiced against defendant, and that at the time he qualified himself as a juror he had formed no conclusion as to the guilt or innocence of the accused. It is to be noted, however, that this juror nowhere denies that he made the remark attributed to him, and under the circumstances mentioned by the other two jurors, and no explanation of this fact is attempted.

A defendant in a criminal prosecution is entitled to a fair and impartial jury, and a verdict of conviction, however just, should be above suspicion as to its fairness and entire compatibility with the just and pure administration of the law. *Hanks* v. *State*, 21 Texas, 526; *Henrie* v. *State*, 41 Texas, 573; *Nash* v. *State*, 2 Texas Ct. App. 362. If the remark had not been made, the juror should have so stated; if made, but made in jest, that fact should have been stated in connection with the other facts stated in the affidavit. *O'Shields* v. *State*, 55 Ga. 697.

The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

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C. L. AVERY v. THE STATE.

1. DECLARATIONS BETWEEN CONFEDERATES — PRACTICE. — No inflexible rule requires more than a *prima facie* showing of conspiracy between the defendant and a confederate, in order to make declarations of the latter evidence against the former. Nor is it absolutely requisite that the showing of the conspiracy shall precede the proof of the declarations, though that is the usual and preferable course of procedure. Such matters are largely subjected to the judicial discretion of the trial judge.
2. SAME. — Every act and declaration of each conspirator, pending and pursuant to the concerted plan and object, is the act and declaration of all and each of them, and it is therefore original evidence against any one of them, irrespective of the time at which he engaged in the conspiracy. Otherwise with regard to declarations

made subsequent to the consummation of the conspiracy and not acquiesced in by the other confederates.

3. SAME.—In a trial for murder the State was allowed, over objection, to elicit from a witness what he was told by a confederate of the defendant, in the latter's absence and after the murder, about concealing the gun it was committed with. *Held*, not proper evidence to inculpate the defendant, but, being obviously of no significance in the present case, it was of no materiality. If the object of the proof had been merely to trace up and identify the gun, it would, it seems, have been legitimate.
4. EVIDENCE OF DECEASED WITNESS.—A person called to prove the testimony given at a former trial by a witness who has since died may state its substance, if unable to repeat its words.
5. THE "RULE."—The enforcement of the rule to sequester the witnesses rests in the discretion of the trial judge, and his action will not be revised on appeal unless abuse of that discretion to the appellant's prejudice be made apparent.
6. ACCOMPLICE TESTIMONY.—Note in the opinion the charge to the jury on the subject of the testimony of an accomplice and its corroboration, and which is sustained by this court.

APPEAL from the District Court of Limestone. Tried below before the Hon. D. M. PRENDERGAST.

This is the companion case to that of *Simms* v. *State*, which precedes it in this volume, and, like that case, resulted in a verdict of murder in the first degree and a life-term in the penitentiary. The evidence adduced by the State to establish the *res gestæ* and the inculpatory circumstances was in both cases the same in substance and elicited from the same witnesses, with very few exceptions. A full detail of that evidence having been given in the Simms case it is not necessary to recapitulate it here, and it is sufficient to note only such matters as are peculiar to the present case. The evidence of the deceased witness, Pollock, was reproduced in this case by the testimony of J. Kimball, instead of by that of Burrows and Clark, who testified in the Simms case. J. W. Little, for the State, testified that the defendant Avery, when before the citizens' committee, stated that he was with Plummer on the latter's gallery, when the fatal shots were fired. Pete Williams was before that committee, but his shoulder was not examined. On cross-examination, however, the witness said he could not name all whose shoulders were examined,—for the purpose, presumably, of seeing whether there were such indications as the recoil of a gun might leave. There were over a hundred persons at the meeting of the committee, and the shoulders of two-thirds of them were examined. Witness acknowledged that he had raised a subscription to pay lawyers to prosecute the defendant.

O. S. Mason, for the State, testified that soon after the killing of William Simms the defendant Avery came to witness' house early in the night, hallooed at the gate in rather a low tone, and, when witness went out, said he wanted to talk to him. They went around into a ravine, and Avery said he wanted witness to go with him to Groesbeck, as he desired to give himself up to the sheriff. Witness, being tired and sleepy, refused to go with him. Defendant stayed in witness' field the next day. He said he was innocent of the killing, and was sitting on Plummer's gallery when it was done; that Plummer had gone off late in the afternoon, but came home shortly after he, Avery, heard the shots; that he met Plummer at the gate and Plummer said he had "got that fellow;" that he asked who, and Plummer replied, "Bill Simms;" that he then inquired why he had shot him so much, and Plummer replied "to stop his d—d hollering;" and that Plummer said that this was the sixth man he had killed, and that he, Avery, was the only person who knew about it, and if he told it, that he, Plummer, would kill him.

On his cross-examination, this witness Mason said he had known Avery since about 1846, and knew his reputation until after the war to be that of a peaceable, quiet, good citizen, though at times he would drink a little too much whiskey. Repeating Plummer's last remark to him on the occasion in question, Avery gave the language to witness as follows: "Avery, I have gotten away with six men before; you are the only one who knows my secret, and if you tell it you will go the same way the other six went."

J. G. Parsons, for the State, testified that a conversation took place in his cotton-patch, the Monday after the killing of Simms, between him and the defendant, Avery. In that conversation Avery said that, when the gun was fired which did the killing, he was on one side of Plummer's gallery, Plummer on the other side, and Mrs. Plummer between them, suckling her baby. After the meeting of the citizens, Avery said to witness: "Some one told me that I was accused, and I am afraid they will take me out and try to make me tell something, and I am too old to be treated that way;" adding that he did not intend to stay in the house at night, but would stay out.

On his cross-examination the witness said that Bill Simms and Avery were at his house to supper, about two weeks before the former was killed, and after supper went off and talked for half an hour; after which they came back, and a general conversation ensued. When Simms left, he invited all the party to come and see him. Avery's reputation as a peaceable man is good. He worked at Plummer's for a few days before and after the murder. Monday morning after that event, he started to go to the deceased's, but Gregory, the magistrate, sent him after Mr. Rogers. Witness saw him at the burial of the murdered man.

The defense introduced W. J. Reeves, Peter Roehurst, and Henry Avery, whose evidence has already been given in the Simms case. The only other witness for the defendant was Nathan Hooper, who testified that, with Gregory and others, he visited Plummer in the jail, and Gregory told Plummer to make a statement to witness. Relating the statement then made by Plummer, the witness proceeded as follows: "Plummer then said they (inferentially Bunk Simms, Avery and himself) went together. I asked him who did the shooting. He said he did not know. I asked him why? He said because they came to him and forced him to go, and said to him, 'You know about it, and, d—n you, you've got to go;' that as soon as he got a chance to run he did so, and was forty or fifty yards off when the shooting was done. Gregory then stopped Plummer in his story and said to him, 'you have sworn differently before committee.' Plummer further said to me that he didn't know who had the gun and pistol,—thought Bunk Simms started with gun. He said something about a pistol being drawn on him to force him to go with them."

In his cross-examination, this witness gave more of Plummer's statement in the jail on the occasion in question,—as follows: "Plummer said Bunk Simms came to him in the field and pulled out a pistol, and said to him, 'd—n you, you've got to leave, you can't appear against me.' Plummer didn't say anything to me about Bill's hollering when he was shot." This witness and several others concurred in according to the defendant Avery the reputation of a peaceable and quiet man.

In rebuttal, the State examined E. Summers, the father-in-law of Bunk Simms. He testified that Pollock came to his house the night of the killing of William Simms, to tell him of it. Witness did not know where Bunk Simms was when Pollock was there, but he came soon after Pollock left.

On cross-examination he said that about sunset the day of the murder, he saw the defendant Avery plowing alone in Plummer's field. Witness did not see Bunk Simms that afternoon, nor know where he was at the time of the killing. What became of Avery after sunset, the witness did not know, but he, Avery, was staying at Plummer's, and his family at Parsons', at the time William Simms was killed.

Farrar & Prendergast, and *Herring, Kelley & Williams*, for the appellant.

Thomas Ball, Assistant Attorney General, for the State.

WINKLER, J. At about twilight on the afternoon of the thirty-first day of May, 1878, the neighborhood of William Simms, a bachelor living alone in Limestone county, was startled by the report of fire-arms in the direction of Simms' house. Early in the night those living near became aroused, and as by common consent the house of Simms was approached, when the solitary bachelor was found, agreeably to the testimony of the justice of the peace of the precinct, lying in the yard at the steps, dead, with eight shots in his body, and three in the wall beyond where he had been sitting. Wadding was found in the yard, made of rotten yellow-brown paper. This witness says that at the time the shot was fired, Simms must have been sitting at the supper-table, eating. The churn of milk sitting near the table was turned over, and there were several shot in the back of the chair upon which he was sitting. Shot subsequently taken from the gun corresponded with the buck-shot taken out of Simms' body; another ball taken out of his body was larger and seemed to be a six-shooter large ball. The wounds on the neck and shoulder, which were supposed to have been made with the pistol, ranged downward, and were larger than the other wounds. The neck of the deceased, and his shirt, where wounded with the larger balls, were powder-burned.

The killing seems to have occurred on Friday of the week, and seems to have aroused in the neighborhood a general determination to ascertain who were the perpetrators; investigations and examinations were made in order to ascertain the facts, and informal meetings were resorted to, which led to the arrest of Bunk Simms, a brother of the deceased, and two of his tenants, one Plummer and this appellant, as the guilty parties. Plummer, after having fled to Louisiana and being pursued and arrested, turned State's evidence. This appellant was prosecuted by a separate indictment, charged with the murder; and on a second trial was found guilty of murder in the first degree, his punishment being assessed at confinement in the State penitentiary for the term of his natural life; and, after a motion for a new trial had been overruled, he prosecuted an appeal to this court, and now seeks a reversal of the judgment of conviction against him, on the following assignment of errors:

1. Because the court erred in admitting the immaterial and irrelevant testimony of the witnesses Pete Williams, J. T. Plummer, James Kimball and J. W. Little, as shown in bill of exceptions in the case.

2. Because the court erred in refusing to give the charges asked by the defendant, numbered one and two.

3. Because the court erred in refusing to grant a new trial upon the ground that the verdict of the jury is contrary to the law and the evidence; the evidence in this cause being insufficient to warrant a verdict of guilty.

These assignments of error embrace three separate propositions; first, that the court erred in its ruling upon the evidence; secondly, that the court erred in refusing to give to the jury certain special charges requested by the defendant's counsel; and thirdly, the sufficiency of the testimony to support the verdict; which propositions will claim our attention in the order presented.

The first error assigned is based upon the rulings of the court on evidence, which several rulings are specifically set out in a bill of exceptions reserved on the trial below and embodied in the transcript sent up for inspection, and embrace the following questions, each of which demand a separate consideration at our hands: 1st, the State's witness, Pete Williams, being on the stand and testifying as to a conversation which occurred at a time previous to the homicide, and when the defendant was present, in which a question was asked by Bunk Simms and answered by the defendant; and to the question and answer the defendant's counsel objected on the grounds, 1st, because irrelevant and immaterial; 2d, because the declarations of Bunk Simms, made a month or two before the killing, could not affect the defendant; and 3d, because no conspiracy to murder Bill Simms had been proven and the answer did not prove such a conspiracy. The objection being overruled the witness testified that Avery said to Bunk Simms, "That fellow was at my house last night, and cursed and abused me mightily," and Bunk Simms said, "Who, Bill?" and Avery answered, "Yes."

II. The same witness, Peter Williams, was further asked by the State what was the state of feeling between Avery, Bunk and Bill Simms. This question and the answer thereto were objected to by the defendant, 1st, because immaterial; 2d, because until a conspiracy between the defendant and Bunk Simms to kill and murder Bill Simms had been proven, the state of feeling between Bunk and Bill Simms could not affect the defendant. The objections being overruled, the witness testified that "Bunk Simms did not like his brother Bill; they were at outs;" but he could not say as to Avery.

III. J. T. Plummer having testified that he and defendant and Bunk Simms went to the house of Bill Simms, and that Bunk Simms carried the double-barrel shot-gun which did the killing, counsel for the State asked him the question if Bunk Simms after the killing told him where the gun had been hidden, after the killing, and if so where; to which question and the answer thereto defendant objected, 1st, because it was not shown that Avery was present; 2d, because this was after the killing and after the purpose of the conspiracy, if any, had been accomplished.

The objections were overruled and the witness testified that "Bunk Simms told me where he had hidden the gun, but Avery was not present, and I went and got the gun and hid it in another place."

IV. James Kimball, a witness for the State, was introduced to prove what Wash Pollock, a State's witness now dead, had sworn to on a former trial, and said that he could repeat the substance of Pollock's testimony, but that he could not say that he could repeat all of his testimony that was drawn out on cross-examination, but could the substance of it. Defendant's counsel objected on the ground that he could not state all that Pollock said on cross-examination, but what he could state would be correct. The objection was overruled, and the witness was permitted to testify as to what the deceased witness had sworn on a former trial.

V. The rule having been enforced as to the witnesses, J. W. Little was offered as a witness in behalf of the State. His testimony was objected to by the defendant, 1st, because the witness was in the court room and heard a part of the testimony of the State's witness Gregory; 2d, because Gregory had conversed with the witness Little, who had informed him of his (Gregory's) recollection as to a matter involved in the examination. The witness Little, being examined as to the objection to his testifying in chief, said: "I have not been under the rule; I have just come from home; I have heard a part of Gregory's testimony, and Gregory told me the point as to which my testimony would be taken, and Gregory informed me what his recollection was upon that point." The objection being overruled, the witness was permitted to testify as set out in the statement of facts. In signing a bill of exceptions as set out above, the judge appends thereto the following explanation as to his rulings: "The evidence in this case, as in the case of *The State* v. *Simms*, tried a few days ago, leaving out the testimony of the accomplice, is all circumstantial, and in such case I take it that any fact bearing even remotely upon the transaction, and tending to throw light upon it, is admissible in evidence. The evidence here objected to, except the evidence of the witness Little, I take to be of that character. The witness Little had testified a few days before, on the Simms trial, as to the same matter, and, knowing what his evidence then was, I thought it a proper exercise of judicial discretion to allow him to testify in this case. And further, while the fact testified to by the witness was to a great extent immaterial, the necessity or propriety of the introduction of the evidence was induced by an attempt on the part of the defendant to contradict the evidence of the witness Peter Williams."

The charges asked by the defendant's counsel and refused by the court, which form the second assignment of error, are as follows:

"1st. If the jury believe from the evidence that a conspiracy on the part of the accomplice J. T. Plummer and Bunk Simms and the defendant Avery, to murder William Simms, is established only by the testimony of the accomplice, and that Plummer's testimony to that fact has not been corroborated by some other witness, then the conspiracy to murder William Simms has not been proved.

"2d. It is not sufficient that the evidence of the accomplice be corroborated by other testimony as to one of the several parties charged with the murder of William Simms, but the confirmation should be in some fact which goes to fix guilt upon the defendant as charged in the indictment; and if you do not believe the accomplice Plummer has been thus corroborated on some fact which goes to fix guilt on the defendant Avery, you will find him not guilty."

These instructions were refused on the ground, as stated by the judge, that "they are based on an assumed want of proof which I do not think exists. So far as I think the legal proposition embraced in the second instruction asked is applicable to the facts, it is, I think, sufficiently covered by the general charge."

That portion of the general charge which relates to the necessity of corroborating an accomplice is as follows: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense,— that is, if it merely shows that a murder has been committed. The term *accomplice* as here used includes any one connected in a criminal sense with the offense committed, either as a principal or otherwise. To corroborate means to strengthen, to make more certain, to give additional strength to; and the corroboration may be by testimony either direct or circumstantial, and by proof of the same facts testified to by the accomplice, or by the proof of other and different facts, provided, in either case, such facts tend to connect the defendant on trial with the offense committed. If the testimony of the witness Plummer, an accomplice in this case, has been thus corroborated, and the evidence then taken altogether leaves you without reasonable doubt as to the guilt of the defendant, you should return a verdict of guilty; otherwise not guilty."

The foregoing contains a sufficient reference to the record in order to determine understandingly the various errors assigned by the appellant's counsel.

Recurring now to the first assignment of errors, and to defendant's bill of exceptions, as to the first point mentioned in the bill of exceptions which relates to a conversation between Bunk Simms and Avery at a time anterior to the killing, and also as to the testimony embraced in the second point in the bill, we are still of the same opinion expressed in the case of *Simms*, decided by this court on a former day of the present term. The testimony was both relevant and material under the peculiar circumstances which attended the investigation. The principal objection urged against the admission of the testimony seems to be based upon the idea that there had not been, up to that time, any definite proof that a conspiracy had been formed by and between Bunk Simms, Plummer and the defendant on trial, to take the life of William Simms; and that therefore it was not competent to prove a conversation between Bunk Simms and Avery, which did not embrace Plummer also, or to inquire into the state of feeling existing between Bunk Simms and William Simms anterior to the killing.

It is true that, in proving conspiracy, in order to make the acts and declarations of one admissible against another or others, it is usual to commence with proof of the conspiracy to do the thing for the doing of which it is desired to charge the other parties concerned; but this rule is by no means absolute, and for obvious reasons. The general rule itself seems not to be so broad as is contended for in the present case; it only requires that a foundation be first laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of a conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. 1 Greenl. Ev. § 111. So that it is erroneous to suppose that there is any inflexible rule of law which requires in the first instance more than a *prima facie* case of conspiracy in order to let in the evidence. The rule as thus stated is not without its recognized exceptions. Says Mr. Wharton in his work on Criminal Evidence, § 698*a*, "As it may sometimes interfere with the proper development of the case to require the trial to begin with the proof of the conspiracy, in such a case the prosecution may on the trial prove the declarations and acts made and done in absence of the others, before proving the conspiracy between the defendants, provided, proof of such conspiracy is afterwards made." Mr. Greenleaf (1 Greenl. Ev. § 111) says: "Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof at a subsequent stage of the cause."

It seems, however, that whether the court shall hear the evidence when offered or first require proof of the conspiracy is a question which addresses itself to the sound discretion of the judge before whom the trial is had; and in such a case we would not feel inclined to interfere further than to ascertain that proper proof of the conspiracy was in fact made at some proper stage of the trial. In fact we are not aware of any rule of law in general, or of practice in any of the courts in Texas, which requires absolutely that either party to any kind of suit whatever shall commence a chain of evidence by which a case is to be proved at any particular point in the chain of evidence. On the contrary, he may commence at either end of the chain, so that he connects with the other, or he may commence in the center or at any other intermediate point, and from there connect with both ends of the chain. *Heard* v. *State*, 9 Texas Ct. App. 1.

It would, however, be more systematic in the conduct of a trial to commence at either one or the other end of the chain of evidence, and connect, link by link, in regular successive order, to the other end; but, whilst this would better accord with correct practice, it would often be found impracticable and inconvenient, and ought not to be enforced with any great degree of severity. In cases like the present, the law is, that, when the connection of the several individuals in the unlawful enterprise is established by competent testimony, every act and declaration of each member of the confederacy in pursuance of the originally contemplated plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. And it makes no difference at what time any one entered into the conspiracy; every one who enters into the common purpose or design is generally deemed in law a party to every act which has been done by others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design. 1 Greenl. Ev. § 111, and authorities cited in note 1; *Davis* v. *State,* 9 Texas Ct. App. 363; *Cox et als.* v. *State,* 8 Texas Ct. App. 254; *Simms* v. *State,* at the present term, *ante,* p. 131.

As to the question to and answer of the witness Plummer concerning the disposition which Bunk Simms had made of the gun after the killing, set out in the third paragraph of the bill of exceptions, we are of opinion that, in the absence of proof that the defendant Avery was present, and because the enterprise in which they had been engaged had been consummated by the death of William Simms, before the statements were made, the statements so made were not strictly admissible against this defendant; but, whilst this is true, we fail to see that it was of any material importance in determining the question of the defendant's guilt. Whether Bunk Simms hid the gun or not, after it had performed its part in the work of depriving William Simms of his life, was to our minds of very little moment, and, whether admitted or excluded from the jury, the verdict would doubtless have been the same. We can conceive of but one object counsel could have had in view in asking the question; that is, that information might thus be obtained which would lead to the discovery and recovery of one of the implements with which the murder was effected, and even for this purpose the question might well have been omitted, for the reason that similar testimony was obtained from another source, and which was received without objection, as is shown by the testimony of the witness Gregory as set out in the statement of facts. In this connection it should be noted that, whilst in *Simms'* case, decided at the present term, the testimony of Gregory was excepted to at the trial, in the present case it was received without objection.

With reference to the fourth point in the bill of exceptions, we are of opinion the objections to the admissibility of the testimony of the witness Kimball, offered for the purpose of reproducing on the trial facts which had been testified to by a witness on a former trial of the case, who was shown to have died since giving his testimony, were not well taken. The witness Kimball, on his examination, brought himself within the well established rule of law to reproduce the testimony of the deceased witness, by showing an ability to give the substance of the testimony of the deceased witness. *Black* v. *State,* 1 Texas Ct. App. 368; *Simms* v. *State,* decided at the present term, and authorities there cited, *ante,* p. 131.

With reference to the witness Little, as set out in the fifth paragraph of the bill of exceptions, it is sufficient to say that, questions of this character being confided to the discretion of trial judges as to whether a witness who had not been placed under the rule shall be permitted to testify or not, this court will not revise the action unless a clear case of abuse of judicial discretion be made to appear, and that too to the prejudice of the defendant. *Jones* v. *State,* 3 Texas Ct. App. 150; *Ham* v. *State,* 4 Ct. App. 645; *Estep* v. *State,* 9 Texas Ct. App. 366. As to the witness having conversed with another witness, this portion of the objection had reference to his credibility, not to his competency.

With reference to the second assignment of errors, the refusal of the judge to give to the jury certain special instructions asked by the defendant's counsel as hereinbefore set out at length, we are of opinion that the court did not err in refusing the charges. With reference to the first charge asked and refused, the true inquiry was whether the defendant on trial was connected with the murder as a principal participant, or not; and not as to whether all the parties charged with the conspiracy had so participated.

As to the second charge asked and refused, we are of opinion it was unnecessary; the general charge as set out herein being deemed sufficient to properly inform the jury as to their duty on this branch of their investigation. The general charge of the court on the subject of the necessity of the corroboration of the testimony of an accomplice in order to warrant a conviction, and as to the certainty to which the corroborating testimony must tend, is deemed to be amply sufficient. There is no exception to the general charge of the court as given to the jury; the special charges seem to have been requested on the idea that the general charge, whilst deemed correct, fell short of giving to the jury all the instructions necessary for their guidance under the facts in evidence. We are of opinion the general charge is not obnoxious to this criticism.

With reference to the third assignment of errors, to the effect that the testimony is not sufficient to support the verdict, we are of opinion this raises but one question, to wit: the sufficiency of the evidence confirmatory of the witness Plummer. This question addressed itself first to the consideration of the judge who presided at the trial, and was raised by the motion for a new trial. He had the witnesses before him, saw their manner of testifying, and how they stood the test of a rigid cross-examination, and refused a new trial. This being the case, this court would not interfere unless indeed the testimony as disclosed by the record before us should appear to be insufficient to warrant the verdict of the jury and the judgment of the court. The testimony of the accomplice Plummer established, as conclusively as that character of testimony can, the guilty participation of appellant, as well as of himself and Bunk Simms, in the murder charged in the indictment, and we are of opinion that the testimony of Plummer was sufficiently corroborated by other witnesses to the extent of pertinently identifying the appellant with the crime committed. We are of opinion the verdict and judgment are not without legal and competent testimony sufficient for their support. It is within the knowledge of this court that the appellant has heretofore been convicted on testimony quite similar to that adduced on the present trial. That conviction was set aside, but not on account of a defect in the proof. On the present trial, so far as we can determine, every legal right of his under the law has been carefully guarded. The general charge of the court seems to have been entirely fair and impartial, and submitted to the jury in appropriate language every issue arising upon the evidence.

We have given to the case our most serious consideration, without discovering any error committed on the trial below which would warrant this court in interfering with the judgment rendered. This being the case, however serious the consequences may be to the appellant, it is our duty to affirm the judgment, and it is so ordered.

Affirmed.

FORREST HUDSON *v.* THE STATE.

1. AN INDICTMENT is not vitiated by bad spelling.
2. INDICTMENT.—Motion in arrest of judgment because the indictment did not conclude "against the peace and dignity of the State" was founded upon the mis-spelling of the word "against",—the "i" and "n" being so transposed as to read "*aganist.*" *Held,* that the court did not err in overruling the motion.
3. CHARGE OF THE COURT.—A charge must be taken and construed as a whole, and if as a whole it is correct, no detached portion, unless

in and of itself sufficient or calculated seriously to mislead, or liable to grave misconstruction, will require a reversal of the case.

4. THEFT.—If the property alleged to have been stolen came into the possession of the accused by lawful means, the subsequent appropriation of it is not theft; but, if the taking, though originally lawful, was obtained by any false pretext, or with intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

APPEAL from the District Court of Johnson. Tried below before the Hon. J. ABBOTT.

The indictment charged the theft, from Philip Welsh, of two horses, in Johnson county, on the 20th day of September, 1879. Trial resulted in conviction, and five years' confinement in the penitentiary was the penalty assessed by the jury.

The substance of the testimony of Philip Welsh, the first witness for the State, was that in September, 1879, he was living with one Isaac Holloway, in Bosque county, Texas, with whom he had a contract that may be stated thus: The witness owned two fine trotting horses. Holloway was to furnish the witness board for himself and feed for his horses, and he was to train them to trot, and the two, Holloway and witness, were to take them to the fall fairs and enter them for prizes, the proceeds, if any accrued, to be equally divided. The approaching fair at McKinney was one among the many to which the horses were to be taken and entered. Just before getting ready to start to the McKinney fair, Holloway decided that he would not go, according to agreement, but would move away, and said that he would take the best of the two horses, and he forbade the witness taking that horse out of the stable for training purposes, and commenced a system of abuse of witness. At this juncture the witness appealed to several parties, Kinchloe among the number, to buy Holloway out and assume the contract upon the same terms. About the middle of September, 1879, the defendant, who was present at some of the disagreements of Holloway and witness, accosted witness at the stable and said to him, "Philip, you want a friend," and promised that if witness would trust him, he would manage the matter all right, adding, "if I don't, you may shoot me." He told witness that Holloway was trying to get his horses; that if witness would make him, defendant, a bill of sale to the horses, he would go with witness to the fairs, trot the horses, and divide the profits. Defendant also promised, by way of inducement, that he would pay Holloway what was due him, and leave the horses in the possession of witness. The witness went to defendant's house one Thursday evening, and made him a bill of sale to the horses and buggy, which defendant tore up, saying it was not right, and on the following day he made another which was witnessed, at the request of defendant, by Campbell Worsham and Ham Worsham. The object of the witness in executing the bill of sale was to get the defendant to pay Holloway, and thus keep him from taking his horse, and to enable him to attend the fairs and enter the animals. The witness asserted his intention of paying Holloway as stipulated in his contract, as soon as the money could be made at the various fairs, and disclaimed having ever entertained a purpose to defraud him of his dues.

It was not understood between defendant and witness that this was a sale of the horses, but, on the contrary, that it was not, and that the latter was to retain possession of the animals. The bill of sale was signed by the witness, who is a foreigner, because the defendant told him it was necessary in order to keep Holloway "off" of them until they could get to the fairs. The last bill of sale was dated about September 16th. The witness did not then deliver possession to defendant, but retained it himself. On making the first bill of sale, defendant paid witness $2.50 or $3.50 in silver, saying it was necessary to pass that to make the transaction "solid," the understanding at the time between them being that when they should go out of the house, witness was to give this money back to defendant; which he did. This money was paid in the presence of Ham Worsham, and was paid back to defendant by witness as soon as they stepped out of the house. At this time defendant told witness that he had a $100 Confederate bill that would have done for "this business" as well as any, but his wife being absent he could not find it.

On Friday after the execution of this last bill of sale, the witness drove his horses and buggy to defendant's house, and defendant got in the buggy and with witness drove across the Brazos river, around A. R. Welshe's house, near the Johnson county line, and from there down to the Elm-hollow,—a creek that runs into the Brazos. After going in that direction some distance they found the traveling rough and took the horses from the buggy; which defendant pushed into the brush, and the two took the horses down into a broken, brushy place in the hollow, where the defendant left witness and his horses. The witness remained in the brush all night. Next morning, about nine o'clock, Ham Worsham brought witness some bread and meat, and by him witness sent defendant word to come to him. About three o'clock on the same evening, the defendant and Ham Worsham came to the hollow where witness and his horses were. Defendant walked past witness without looking at him, and walked straight to where the horses were tethered. Witness followed, and defendant then told him that Holloway was "raising a mob" to hang witness. Witness answered that he had done nothing to be hung for; to which defendant replied that this was "Texas;" that "they didn't care a d—n for law in Texas," and unless witness let him have the horses Holloway would hang him. Defendant further stated that he had a friend at Sandy Flat in Johnson county, to whom he would send witness on the following day, Sunday, and that he would follow Wednesday, bringing witness his horses, when they would proceed to the fair at McKinney. Witness contended that he was not to give up the horses, but defendant insisted that unless he did so for the time indicated he would be hung by Holloway and the mob. Under these assurances of danger and promises to return the horses at Sandy Flat on Wednesday, witness finally consented that defendant should take the horses for the time stated. Defendant and Ham Worsham then took the horses and left, and the latter returned late that evening with another team and some provisions. Witness and Worsham slept that night in the brush, and next day drove to Sandy Flat and stopped at a Mr. Beck's. Witness staid here two weeks, during which time he saw nothing of defendant, and has never seen his horses since.

At the end of two weeks the witness left Sandy Flat to hunt his horses, and found they had been carried into Montague county. The horses belonged to witness,—defendant had never paid him anything for them, except as stated.

The cross-examination failed to change the testimony of this witness. He stated, however, in addition to his testimony in chief, that no force was used to obtain possession of the animals,—he saw no weapons. He denied having told one Templeton, or other person, in Montague county, that while he was driving along the road the defendant and a boy, armed with pistols, made him get out of his buggy, and took the buggy and horses and drove off. Defendant's wife was not present when the bill of sale was signed, nor had he ever said in her presence or elsewhere that defendant had ever paid him, except in the manner stated, or that they were "even."

Wm. Kinchloe testified for the State that, sometime in

September, 1879, Philip Welsh came to him and asked him to buy of Holloway his interest in the two horses he was training to trot, and to assume Holloway's contract with him in regard to their exhibition at fairs. Witness declined, saying he was not the man to wrong any one, and Welsh answered that witness did not understand him,—he did not want to wrong Holloway, but wanted witness to take Holloway's place in the contract and divide profits with him, after buying Holloway out, as he was afraid of Holloway, who had misused him. Witness followed Holloway (who moved from Bosque county about the middle of September) across the Brazos river to Kimble, to pay him some money he owed. In Kimble, Bosque county, the defendant told witness that he had taken the horses into Montague county, and that he had paid Welsh $200 for them, and asked witness why Welsh did not come and take them if he claimed them as his.

Mark Crabtree testified for the State that after Holloway left Bosque county, but in the month of September, 1879, he saw defendant on Haley's Branch, Johnson county, driving one of Welsh's horses in his buggy.

Beck and Adams testified that Ham Worsham brought Welsh to Sandy Flat, about the middle of September, 1879, and that Welsh staid there some two or three weeks.

Ham Worsham, for the defense, testified substantially that, at the house of defendant, he was called on to witness a bill of sale from Welsh to defendant of the horses; that he saw defendant pay Welsh two or three dollars in silver, and heard him say on paying it, "that is the balance on that one hundred dollars," and heard Welsh say "yes." Next day Welsh asked witness' brother Campbell to sign the bill of sale as a witness, which he did with his mark, defendant writing the name. Defendant then said, "that makes it all right, don't it, Philip?" Welsh said "yes," and that he then delivered to defendant the horse he was riding, but borrowed it to ride to Mr. Holloway's. After riding some distance towards Holloway's, Welsh galloped back to defendant and witness, and said that he had forgotten to include the harness in the bill of sale. Defendant said that it made no difference, and Welsh answered, "all right, it goes with the buggy anyway." The next day, when Holloway went to move, he told Welsh to tie his, Holloway's, sulky behind the buggy, and take it to Kimble. Welsh tied the sulky behind, and he and witness got in the buggy, and, instead of going to Kimble, went to witness' mother's house, where they met the defendant. Then Welsh said to defendant, "there's your buggy and horses." Defendant told him to untie the sulky, which he did. Welsh then asked witness to go to Kimble next day and tell Holloway where his sulky was. Witness did so. On Friday defendant told witness that he had sent Welsh to graze the horses, and, pointing in the direction of a field in which he had gone, asked witness to go and tell Welsh to bring the horses to the house. Witness crossed the large field in which the grazing was good, crossed the river into Elm Hollow, where the grazing was poor, and there found Welsh and the horses. He delivered defendant's message, but Welsh said he would not again cross the river, as he was afraid of Holloway, but told witness to tell defendant to come to him. Witness and defendant returned to Welsh, and then Welsh delivered the horses to defendant. No force was used; nothing was said by defendant to Welsh about a mob or about Holloway threatening to hang him. After assisting defendant in taking his horses home, witness returned to Welsh, as requested, with supper and breakfast, and staid all night with him in the brush, and, as requested by defendant, next morning took Welsh to Mr. Beck's at Sandy Flat. On the following Sunday witness returned to Sandy Flat, taking Welsh his clothing. Witness denied having told Beck or others that defendant authorized him to say to Beck that he, defendant, would call for Welsh at Beck's on Wednesday, to take him to the McKinney fair. He denied having told one Gibson at the Elm Hollow crossing, on September 20th, that he did not know where Welsh was, and that he "reckoned he had gone to h—ll." Denied having told Gibson afterwards in Cleburne that on September 20th, when he met him at the Elm crossing, that in fact he did know where Welsh was, and that he had just left Welsh in Elm Hollow.

Campbell Worsham corroborated his brother in regard to his making his mark as a witness to the bill of sale, at Welsh's request, and testified that on that occasion he heard Welsh deliver to defendant the possession of the horse he was riding, but immediately borrowed him to ride home.

Defendant's wife, Clarinda Hudson, testified for the defense that about the middle of September, 1879, defendant, in her presence, paid Welsh a $100 greenback bill,—one that she had had for five years. Witness was in Hill county at her brother's when her husband, the defendant, came for her, and told her that he had bought a buggy and horses, and wanted her to go home and get the $100 bill for him. She went home, as requested, and got it out of the bed where she kept it. In her presence, the defendant gave the bill to Welsh, and said, "that makes us even," and Welsh said "yes." Witness heard defendant tell Welsh to take the horses out to graze.

On cross-examination witness said she could neither read nor write, and knew the bill to be a $100 greenback bill only by her husband's telling her so when he gave it to her five or six years before.

Wm. Templeton testified that between the 20th and last of November, 1879, at his home in Montague county, Welsh told him, in the presence of one James Putnam, that he, Welsh, had started some time before to the McKinney fair, and while driving along the road he was stopped by defendant and a boy, who, with drawn pistols, made him get out of his buggy, when they got in and drove off with the horses and buggy.

The defendant attacked the general reputation of Welsh for truth and veracity, and two witnesses swore that it was bad. The bill of sale was in evidence.

The State recalled Beck, who testified that when Ham Worsham left Welsh at his house at Sandy Flat he said to him that defendant told him to say to witness that he, defendant, would call for Welsh on Wednesday to take him to the McKinney fair. Adams and Stewart testified to the same effect.

Thomas Gibson, also in rebuttal, testified that on 20th September he met Ham Worsham at the crossing of the Brazos near Elm Hollow, and asked him where Philip Welsh was. That Worsham replied, "I don't know,—gone to h—ll, I suppose." That afterwards, during the October term of the Johnson County District Court, he met the said Worsham in Cleburne, and that Worsham then told him that when he met him at the crossing on the 20th September and told him he did not know where Welsh was, he did in fact know, and had but a short time before left him in Elm Hollow.

The defense moved for a new trial, and also in arrest of judgment. Both motions being overruled, an appeal was taken.

De Berry & Smith and *J. M. Hall*, for the appellant. The court erred in admitting the evidence of the witness Kinchloe, as to a conversation had between witness and Philip Welsh, several days before the offense charged in the indictment, and which could not have been a part of the *res gestæ*, and did not tend to prove the guilt or innocence of the defendant in any manner. Appellant was not present at this conversation, and the evidence as to him was certainly irrelevant and immaterial.

The evidence shows that the owner of the property executed to appellant a bill of sale to the two geldings described in the indictment, about 16th September, 1879. Welsh, the owner, says that appellant never paid him for the geldings, and that the object of the bill of sale was to get defendant to pay a man named Holloway what he, Welsh, owed him, and that the bill of sale was a sham. Without attempting to reconcile the statements of State's witnesses, it is to be observed that the evidence shows that the bill of sale was duly executed with all the formality of the law, and there is evidence to show that Welsh admitted the payment of the purchase money. This being the evidence, it is submitted that the first and tenth assignments are well taken, because the court instructed the jury that delivery of the possession of the animals was necessary to pass the title, when the court should have told the jury "when personal property is conveyed by bill of sale, it is not necessary to accompany the bill of sale with delivery of possession in order to pass title." In support of this proposition the following authorities are cited: *Griffin* v. *Chubb*, 7 Texas, 603; *McKinney* v. *Fort*, 10 Texas, 220; *McQuinnay* v. *Hitchcock*, 8 Texas, 35; *Van Hook* v. *Wallen*, 28 Texas, 73; *Hewett* v. *Holt*, 23 Texas, 61; Hilliard on Sales, 2d ed. 98; *Dyer* v. *Bean*, 15 Ark. 15.

The second assignment relates to the venue, and the effect of which is that the court failed to instruct the jury that in this case, if the geldings were brought into Johnson county before they were stolen in some other county, the offense could not be prosecuted in Johnson county, if the appellant brought or carried the geldings into that county before they were stolen, and at a time when they were not stolen property, and the jury should have been instructed that if they found defendant guilty of theft of one of the geldings described in the indictment, in some other than Johnson county, and more than 400 yards from the Johnson county line, then the jury must believe from the evidence that appellant brought the gelding so stolen into, or carried the same through, Johnson county.

The third assignment of error is, in effect, that the court in his charge makes no distinction between a case of fraud of the vendor and vendee or both. Certainly the defendant could not be convicted for the fraud, either actual or constructive, of Welsh. The court should have instructed the jury that if the bill of sale was procured by the fraud and misrepresentation (not *or* misrepresentation, as the court below has it in the charge) of the defendant, such fraud and misrepresentation must have been practiced by defendant on Welsh, in order to constitute a criminal offense, though even then it would not have been theft. It is difficult to see how a mere misrepresentation, without any elements of fraud entering into it, can be considered as one of the constituents of "theft of geldings."

The fourth assignment of error is, that the court erred in 11th paragraph of his charge, because it does not present the law of this or any other case.

It is submitted that, if appellant induced Welsh to execute the bill of sale by fraudulent representations or false pretense, then the offense would be swindling, not theft.

It is true our statute makes theft in general include swindling, but swindling does not include theft.

Neither does theft in general include horse stealing; the punishment for the former is not less than two nor more than ten years in the penitentiary, of the latter not less than five nor more than fifteen years' confinement in the penitentiary.

It is submitted that any fraudulent representation or false pretense which causes one to part with his title is swindling and not theft of horses,—the latter being a specific offense.

There is no such specific offense as swindling one out of his gelding, with a specific penalty. The facts show in this case that if the defendant is guilty at all he is guilty of swindling, and that offense should be given in charge to the jury when he is tried under a proper indictment. The appellant is entitled to have a jury say whether they will give him not less that two nor more than ten years in the penitentiary. The jury, it is to be observed, gave appellant the minimum penalty for horse stealing. *Parchman* v. *State*, 2 Texas Ct. App. 228.

The fifth assignment of errors shows that the court did not instruct the jury as to the kind of appropriation necessary to make this a case of theft; and from the charge of the court the jury might well have inferred that the act of acquiring lawful possession of the geldings was an appropriation of them. The appropriation in a case of this kind must be subsequent to the lawful acquisition of property, and must be distinctly proved, and cannot be inferred from the possession or the act of getting possession of the property. *Berg* v. *State*, 2 Texas Ct. App. 150.

The twenty-first and twenty-second assignments of errors are, in substance, that the court erred in failing to charge the jury as to the difference between theft and swindling.

The facts show the defendant guilty of swindling, if anything, and he could not be convicted of that offense under the present indictment for theft of geldings. The law requires the trial judge to charge the jury on the law applicable to the facts of each case. Certainly a charge intended to cover a charge of theft of geldings does not fit the facts of this case. If this conviction should stand appellant might, under the same charge, be convicted of theft of geldings though the facts in evidence disclosed a case of murder in the first degree.

Theft is a distinct offense. Penal Code, art. 735.

Theft of geldings is a distinct offense. Penal Code, art. 746.

Theft under art. 735 above does not apply to theft under 737.

Theft may include swindling and embezzlement, etc., but this does not mean that theft of geldings shall include these offenses, because the penalty is different. If this were otherwise, then there would be two different punishments prescribed by our statute for the same offense (swindling); 1st, not less than two and not more than ten years; 2d, not less than five nor more than fifteen years. So this will not do.

If the facts show this case to be swindling, then the law for that offense should have been given to the jury. *Simco* v. *State*, 8 Texas Ct. App. 407; *Jones* v. *State*, 7 Texas Ct. App. 338; *Powell* v. *State*, 7 Texas Ct. App. 467.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The offense of which appellant was indicted was the theft of two geldings, the property of Philip Welsh, and it was alleged to have been committed on the 20th day of September, 1879, in Johnson county, Texas. Upon trial and conviction his punishment was assessed at five years' imprisonment in the penitentiary.

Objection to the indictment is made in the motion in arrest that it does not conclude "against the peace and dignity of the State." The objection refers alone to the spelling of the word "against," in which the letters "i" and "n" are transposed, so as to make the word spell as written "*aganist*." The case of *Cox* v. *State*, 8 Texas Ct. App. 254, is not analogous. In that case the word was not mis-spelled; the trouble was that it was not only spelled correctly, but so correctly spelled that there could be no mistake about it or about the fact that it was a complete and perfect substitution of another and entirely different word for the one which both the Constitution and the law declared was essential to the sufficiency and validity of the indictment. The word "aganist" is evidently a mis-spelling of the proper word.

"Bad spelling does not vitiate an indictment if the meaning is unmistakable. *State* v. *Earp*, 41 Texas, 487; *Thomas* v. *State*, 2 Texas Ct. App. 293; *Stinson* v. *State*, 5 Texas Ct. App. 31. Nor bad handwriting. *State* v. *Morris*, 43 Texas, 372; *Irvin* v. *State*, 7 Texas Ct. App. 109. Nor bad grammar. *Gay* v. *State*, 2 Texas Ct. App. 127. Nor tautology and repetition. *State* v. *Richardson*, 2 Texas Ct. App. 322. Nor when the month is written 'Teburary' instead of February. *Witten* v. *State*, 4 Texas Ct. App. 70. Nor 'Janury' instead of January. *Hutto* v. *State*, 7 Texas Ct. App. 44. Nor 'eiget' for eight. *Somerville* v. *State*, 6 Texas Ct. App. 433. Nor 'possion' for possession. *State* v. *Williamson*, 43 Texas, 500." Clark's Crim. Laws of Texas, pp. 421-2 (notes).

The court did not err in overruling the motion in arrest of judgment.

We do not propose to discuss in detail all the errors complained of with regard to the admission of evidence claimed to be irrelevant and illegal, or the objections so strenuously urged to certain portions of the charge of the court, as to their sufficiency and correctness as propositions of law applicable to the facts in the case. In the view we take of the case it would be a useless consumption of time. Besides, most of the questions raised have been settled by previous adjudications of the courts of our State. We propose to address ourselves mainly to what in our opinion constitute the real questions in the case, and no others. We may remark, however, generally with regard to the evidence claimed to be inadmissible, as set forth in defendant's eight bills of exceptions, that the explanations given by the judge as reasons for his action are entirely satisfactory under the law and facts of the case.

Many objections are urged to the charge of the court, and detached portions and paragraphs are separated and made the subject of comment and criticism in the brief of counsel for appellant. It is a rule well settled that a charge should be taken and construed as a whole, and if as a whole it is correct, no detached portion, unless in and of itself sufficient or calculated seriously to mislead or be liable to grave misconstruction, will render necessary a reversal of the case. Taken as a whole, the charge before us is a fair and able exposition of the law with relation to the facts.

But it is urgently insisted that the facts develop a case of swindling and not of theft, and that the court erred in not submitting the question of swindling, inasmuch as the punishment for the latter offense is less than that of theft; and that appellant was entitled to have the jury say whether or not they would give him not less than two nor more than ten years in the penitentiary, instead of being limited to not less than five nor more than fifteen, which is the punishment for horse-stealing.

In preparing their argument in support of the proposition that the offense as proven was swindling and none other, counsel seem to have overlooked a most important statutory provision which appears to us to cover the very facts adduced on the trial. The statute provides, with regard to theft, that "the taking must be wrongful, so that if the property came into the possession of the person accused of theft, by lawful means, the subsequent appropriation of it is not theft; but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete." Penal Code, art. 748. This is what the court expressly charged the jury in the 14th subdivision of the charge. The charge is in strict conformity with law and precedent. See *Dignowitty* v. *State*, 17 Texas, 521; *Maddox* v. *State*, 41 Texas, 205; 3 Greenl. Ev. § 160; *Quitzow* v. *State*, 1 Texas Ct. App. 65; 1 Bish. Cr. L. sec. 1017; 43 Texas, 494; 5 Texas Ct. App. 123.

The evidence is ample to establish both the crime and its venue as laid in the indictment.

A careful examination of the record satisfies us that no error has been committed on the trial which requires of us a reversal of the judgment of conviction; and it is consequently affirmed.

Affirmed.

JOHN DUBOSE V. THE STATE.

1. ACCOMPLICE TESTIMONY.—If the inculpatory evidence consists of or substantially depends upon the uncorroborated testimony of a State's witness, and he is shown to have been an accomplice in the perpetration of the offense, a conviction cannot legally be had. And a reasonable doubt as to the complicity of the witness operates the same effect.
2. SAME—PRACTICE.—The defense is not confined to positive or direct evidence of the complicity of the State's witness, but may establish it by any character of evidence which would be admissible if the witness himself were on trial for the offense.
3. CIRCUMSTANTIAL EVIDENCE—THREATS OF THIRD PERSONS AGAINST DECEASED.—In a trial for murder the inculpatory evidence was circumstantial, except the testimony of a State's witness against whom there was some proof of complicity, and the contested issue was the identification of the defendant as the assassin. He proposed to prove that the State's witness was at enmity with the deceased, had threatened his life, and carried weapons for him; but, on objection, the proof was excluded. *Held*, that the proposed proof was competent in this state of case, and its exclusion was error. Otherwise, however, had it not proximately tended to exculpate the defendant, and thus distinguished the case from *Boothe* v. *State*, 4 Texas Ct. App. 202, and others in which the proof only tended to show malice of the third party against the deceased. See the opinion *in extenso* on the question.

4. **BURDEN OF PROOF—CHARGE OF THE COURT.**—The jury were instructed that "in every criminal prosecution the accused is presumed innocent until his guilt is established by legal evidence, and the burden of proof rests upon the State and does not shift till the State has proved, to the satisfaction of the jury, the facts which constitute the offense charged; and when this is done it devolves upon the accused to establish the facts upon which he relies to excuse or justify the prohibited act." *Held* erroneous because it in effect shifts the burden of proof and requires that the defendant shall, on his plea of not guilty, prove his innocence.
5. **SAME.**—When no special plea or independent exculpatory fact is relied on by the accused, and he confines his defense to a traverse of the issues tendered in the indictment, the burden of proof never devolves on him.

APPEAL from the District Court of De Witt. Tried below before the Hon. H. C. PLEASANTS.

The indictment charged the appellant with the murder of one James Benton, in De Witt county, on the 15th day of October, 1875.

Mr. Noltke testified for the State that he lived in De Witt county, about three quarters of a mile from the camp of Benton, the deceased. About 8 o'clock, A. M., on the morning after the killing, James Montgomery came to the house of witness and told him that deceased had been killed, and the two rode down to the camp to see the body. The body was lying on a pallet made of saddle blankets, with the feet towards and near the camp-fire. The bed-clothing was burned as high up as the deceased's hips. There were two wounds in the head which seemed to have entered from behind, and these wounds were powder-burned. One of these shots passed entirely through the head. The witness found neither bullets nor cartridge shells anywhere about the camp. There was another pallet at the camp which seemed to have been occupied by some other person during the night. The witness saw no person about the camp while he was there other than Montgomery, who went with him. The camp was in the forks of Edwards' and Clear creeks, about 30 or 40 steps from the banks of the former, and about 300 yards from the banks of the latter. The witness was at home on the night of the killing. He did not know where the defendant lived at that time.

On cross-examination, the witness stated that he examined for horse-tracks, but found none nearer the body than 15 or 20 steps. Grass was growing about the camp where the body lay. The camp-fire was burning a little, and the witness thought that the deceased had struggled into the fire after being shot, and by that means set the bedding and his clothes on fire. There was nothing over the body, and nothing to indicate that any one else had been in the camp the night before, except that the pallet appeared to have been occupied by two persons. The deceased had no shepherd. The witness saw no arms about the camp,—nothing but a few cooking utensils, some provisions and a few blankets.

The witness had just moved on the day of the night of the killing, and slept in his house for the first time on that night. Robert Riddle lived near the witness on the same tract of land. The witness did not see him on that day nor the next, nor does he recollect of seeing W. C. Bacquet on that or the next day. Riddle's house could not be seen from that of witness, and Bacquet and Riddle might have been about the latter's house without the witness knowing it. The witness saw no one going to Riddle's on the day after the killing. He knew nothing of a herd of cattle being camped in the vicinity.

J. Casprizk testified for the State that he lived between one quarter and a half a mile from the camp of deceased when the killing occurred. Between 9 and 10 o'clock he heard four shots from the direction of the camp, and supposed that deceased was firing to frighten something away. The first two shots were fired in quick succession and the other two after a lapse of a few minutes. The deceased, who had been with his sheep, came to witness' field about an hour before sun-set on the evening before he was killed, and talked awhile. Next morning about 8 or 9 o'clock Mr. Montgomery came to witness' house and asked where the deceased's camp was. Witness showed him and he went in that direction. After getting near the camp he called back to witness to join him quick, saying that the deceased was dead. The witness joined him, and both, though frightened, went up to examine the body, but did not touch it. The witness went back to his work, but "kept his eye" on the camp, and saw no one go there until the justice of the peace came. The witness saw no one about the camp the evening before. Did not know defendant at the time nor where he lived.

On cross-examination the witness stated that he had lived near the camp of the deceased about two months, and was on friendly terms with him. The deceased sometimes visited the witness' house. He had no shepherd at the time of the killing, nor did the witness know that he had ever had one. The shots spoken of by the witness were not fired before 9 o'clock. The last two shots were not so loud as the first two but all sounded like pistol shots. The witness could not say that all of the four shots were fired from the same pistol. Besides his son, the witness had two men living with him at the time of the homicide. One of these men left a day or two after the killing, and the other five or six days after. The witness had not finished his work, but had told them he had nothing further for them to do. One of these men went to the Coleto and the other to San Antonio.

The deceased told the witness, on the evening before he was killed, that he owed James Montgomery about $250, and would try to pay him the next day. He told witness at the same time that he intended to go to Cuero that day, but had changed his mind. The witness occupied the evening before the killing in plowing, and saw no one but his workmen and deceased. The deceased told the witness that he had had a "falling out" with Robert Riddle at the old place (Riddle's house), and that was the reason of his leaving Riddle's and moving to this camp. He had been in the camp three or four weeks. The witness did not see Riddle on the day before or on the day after the killing. Riddle has since been killed. The witness observed a herd of cattle in the vicinity on the morning after the killing, and saw three men, whom he did not know, ride down to the body from the herd, and ride off before witness, who desired to speak to them, could do so. The witness did not know the defendant or Wm. Bacquet at the time of the killing. He knows the latter now, but does not know whether or not Bacquet has been paid to testify in this case.

William C. Bacquet, a witness for the State, testified that the defendant told him on the morning after the killing, that he, the defendant, had killed the deceased on the night before. He describes the circumstances of the confession substantially as follows: The witness was herding his brother's sheep on the prairie the morning after the killing. Robert Riddle came to him, and, after talking a while, and seeing that his sheep were going to shade, he invited Riddle to go with him to his camp for dinner. The two started, and *en route* met the witness' brother and wife going from Cuero to Yorktown. Both parties stopped and talked awhile, and the witness and Riddle then started again to the camp. After they had proceeded some distance they heard some one traveling through the bushes, and soon discovered that it was the defendant. He joined the witness and Riddle, and as he rode up, he said to Riddle, "that man (or fellow) is in town." The defendant and Riddle looked at each other for a minute and then the defendant said: "Well, by G—d, I might as well tell you, I killed Benton last night." He, defendant, then said that that morning, while he was standing in a store-door in Yorktown, he saw Van Werk, a constable, coming towards him from across the street, and he thought the constable's intention was to arrest him. He said that he then got on his horse and rode towards Gohmert's tin-shop, across a creek, but saw someone standing in the tin-shop door who looked so much like the deceased that he turned and rode rapidly out of town to Mrs. Edwards', where he changed horses, and from there rode on to where he met the witness and Riddle. He then described to the witness and Riddle the circumstances of the killing. He said that he went to the camp of the deceased about sundown on the evening before, and told him that he had come to talk to him about an indictment against his, defendant's, brother Amos, for carrying a pistol or stealing a cow. That he got down, tied his horse near by, had some conversation which resulted in some kind of understanding about the indictment, and then they ate supper together, and that no enmity was displayed by either during this time. That after supper, they sat around the fire and talked, and that he noticed that deceased, during all this time, had either a knife or axe in his hand. That he finally told the deceased that he was afraid to stay at home or at Riddle's that night, as he believed the sheriff was after him, and asked the deceased's permission to stay in his camp; to which the deceased consented, and they made their pallets down by the fire, and soon the deceased rolled over and went to sleep. That he then shot him through the back of the head. Riddle asked the defendant, at this point of the narrative, what the deceased did, and what he, defendant, did next. He said that deceased made a kind of gurgling noise in his throat, and that he, defendant, raised up on one elbow and knee, and fired another shot through the deceased's head. That when he fired this second shot his horse broke loose, and that he followed and caught him in a few minutes, mounted, rode back, and fired two more shots from his horse. That he then threw quilts over the body and set them on fire. That he then rode into Edwards' creek, rode down the bed of it to the mouth, then down Clear creek until he came to a point opposite Riddle's house, where he took a trail, and went up to the house, unsaddled his horse, and went to bed in a back room, where he stayed until morning, and then went to Yorktown.

The witness testified that when this statement was concluded, the three started to Riddle's house, and when they reached a hollow in Anderson's creek, one of the two asked witness to ride to the deceased's camp and see if he was still there. The witness rode to a point within one hundred yards of the camp, from where he heard voices at the camp, and then rode off, going towards Riddle's ranch. In a flat, near Noltke's house, he met Elias Dubose and Riddle, and told them of the voices he heard at the camp, and that he supposed the deceased must be there. From this flat, Elias Dubose, Riddle and the witness rode up to Riddle's house and there they met the defendant. The defendant then saddled a dun mare that had been sold but not yet delivered to witness' brother by Riddle, and rode off in a northerly direction, saying that he was going to some of his relatives up the river. When he started he asked of and received from Riddle a roll of money.

The witness did not see Ned Edwards on that day, but on the next Riddle told him that Edwards had gone up the river after the defendant. On this last mentioned day the witness met defendant and Edwards about a quarter or half mile from McFarland's house. From this point the three went to McFarland's house and sat on the fence awhile, talking of the killing of the deceased. Within a half hour Edwards and defendant rode off. During the conversation the defendant told witness to remember what he had told the day before. When the defendant made his confession the day before, he told the witness that if he told, he, defendant, would "get him," and further said that if the deceased was not dead, he, defendant, would kill him yet. The defendant left Riddle's house about mid-day, going up the river, and Riddle said something about sending for him. The witness did not know the conditions upon which the defendant was to come back, but inferred that he was to return on ascertaining that the deceased was dead. The defendant had no regular place of abode, and witness thinks was not on good terms with the deceased. The witness saw him in the evening before the killing, riding towards Riddle's house, and saw that he and Riddle met some three or four miles from Riddle's house.

On cross-examination, the witness said that his sheep-camp was about three miles from the camp of deceased, and but little farther from Riddle's house. Himself and Riddle were on friendly but not intimate terms when they met on the prairie the morning after the killing. They first talked about sheep, and then about the deceased, and Riddle said that, as he did not like the deceased much, he was glad that deceased was going to settle up his debts and leave the country. From here the witness reiterates his testimony in chief, and proceeds to state in substance that himself and deceased occupied different cabins on Riddle's place in 1874, and had been on good terms, until they quarreled about a joke. The deceased pushed the witness so violently against a buggy wheel during that quarrel, that his neck was badly hurt and himself rendered insensible for some time. The two did not speak for some days, nor until the deceased apologized, saying that he "was in fun." The witness could not remember whether he slept in his camp or on McFarland's porch the night that the deceased was killed, nor did he remember what kind of a night it was. He stayed in the neighborhood, tending his brother's sheep, until the 17th of

November following the killing, and then went to Gonzales county, where he stayed two years. In 1877 he returned to De Witt county and assisted his brother with his sheep, until he went to farm on Crosson's place. He left the county because, one night when he was returning from Shiloh church, he was met in the road by eight men who told him that he knew too much and must leave the county in three days. He could not say whether they wanted him to leave on account of what he knew about this murder, or on account of what he knew about cattle-stealing. He saw the defendant leave Shiloh church that night with some ladies, and did not think he was one of the eight men.

The witness admitted having told Crosson of defendant's confession, or at least part of it, but denied that he had ever told Crosson that he was present and saw the killing. He did not think he had seen Riddle to speak to him for two weeks before the killing, but saw him at a distance on the evening of the killing, about 4 o'clock, traveling towards Yorktown. He did not recollect when he last saw deceased to speak to him, before the killing, but saw him at a distance in the evening before he was killed. He had been in deceased's camp twice, but deceased was not there on either occasion. The witness stated that he had received no money to testify in this case, but that deceased's brother paid his expenses at the previous term of the court.

James Montgomery, for the State, testified that on the morning after the killing he went to Mr. Casprizk's house, *en route* to the camp of the deceased, and inquired of Casprizk the locality of the camp. Receiving directions he rode to the camp and found the deceased dead. He called Casprizk and requested him to stay at the camp with the body until he could bring help. The witness got Mr. Noltke and they returned to the camp, meeting some Germans on the way, by whom he sent word to the coroner at Yorktown. This witness described the condition of the body as it was described by the witness Noltke. There were horse-tracks around, though but one horse appeared to have been tied near the camp. No trail was found by the witness to or from the body. A pistol and knife were found by witness under the head of the deceased; the pistol was cocked and was rusty, as though it had not been fired in a long time. On his way to the camp the witness noticed some men, mostly Mexicans, with a herd of cattle. The witness had an appointment with deceased, to receive some money due him, on that morning, and it was to fulfill this appointment that he went to the camp.

The cross-examination did not change this evidence in any respect, and added little or nothing to it. The appointment to pay the witness at his camp what was due him was made by deceased five or six days before. No one was present at the time, nor had the witness mentioned it to anyone. The witness took charge of the deceased's effects, but found no money, checks or drafts among them.

L. A. Preston testified, for the State, that he knew a certain dun or "clay-bank" mare that had belonged to Riddle. She passed the witness' place with a rider whom he did not know, on the day after the killing, going towards Gonzales county, and was traveling a trail that led in the direction of Louis Dubose's (defendant's uncle) place, in Gonzales county. This was a private trail, used by the families of the Duboses, D. Hunter and Robert Riddle. The witness saw the mare and rider next day, retracing the course of the day before, but did not then recognize the rider.

Cross-examined, the witness stated that he did not recognize the rider on either of the two occasions testified to, but thought he was Riddle from the fact that he rode the Riddle mare.

Ned Edwards was introduced by the State, and testified, in substance, that the defendant came to his house about 9 o'clock on the day after the killing, and that he went to Yorktown with the defendant, and there lost sight of him and saw no more of him that day. The witness was present at the inquest, but did not see the defendant there. After the inquest, the witness went to Riddle's, and from there with Riddle went to Louis Dubose's house, in Gonzales county, that night. Next morning they met defendant at Louis Dubose's, and the three returned, the defendant riding a dun mare which Riddle had sold to the witness Bacquet's brother. The witness did not know the whereabouts of defendant on the night of the killing, but knows that he was not at Mrs. E. Edwards' house. Mrs. Harris, Mary Edwards, now Mrs. Dubose, Alice Edwards, Mrs. Edwards and Elias Dubose were there. Riddle, defendant and deceased had a difficulty some time before the killing, and the latter had had Riddle and defendant indicted for it. The defendant told the witness that if Benton did have him indicted, he would kill him. Defendant told witness this a month or two before the killing, on Cabaro creek. The witness saw Riddle and defendant talking together at Louis Dubose's on Sunday morning next after the Friday night of the killing, but heard nothing they said. As he and defendant exchanged horses frequently on their ride back from Gonzales county, he did not know which was riding the dun mare when they passed Preston's. Defendant told witness at the last term of court not to come to court to testify, in order to enable him to continue his case. Witness did come and answered to his name. Further than this the defendant had said nothing to him about testifying.

On cross-examination the witness admitted that, on the defendant's application for bail, he testified that the defendant was at Mrs. Edwards' house on the night of the killing and stayed there until 10 or 11 o'clock next day.

He admitted that he testified at the same time that he did not go to Louis Dubose's in Gonzales county on the day or night after the killing. He testified then, also, that he did not see Wm. C. Bacquet; all of which was the reverse of what he states on this trial under oath. He was under oath at the *habeas corpus* trial. The reason he testified falsely in the first instance was that he was afraid the defendant would "put him out of the way." The witness had talked with Mr. Hunter about his former testimony and asked him what to do, and was advised by Hunter to tell the truth. The defendant was the witness' brother-in-law when the latter testified under *habeas corpus*. His wife, the witness' sister, has since died. Riddle was married to the defendant's sister at the time of the killing.

The State here introduced two indictments in evidence, one charging Riddle, Elias Dubose and defendant with assault with intent to murder the deceased, and the other charging Amos Dubose with the theft of a cow, the property of the deceased. The State closed.

G. W. Crosson, for the defense, testified that in December, 1877, W. C. Bacquet approached him in Cuero and asked him for employment. The witness employed him, and took him home in his ambulance that night. *En route* they discussed a murder trial that was then in progress in the District Court, and Bacquet told him that he knew of a "worse murder than that," and then detailed the killing of Benton very much as he detailed it in evidence on this trial, but did not at that time tell the witness who did the killing. At the supper-table that same night, Bacquet repeated the narrative of Benton's murder in the presence of the witness' family. When he first gave the witness the particulars of the killing, the witness asked him "how he knew of it?" and he replied that he saw it and was near enough to hear the shots, and that the man who did the killing, immediately after killing the deceased, started to kill him, but that he begged off, and defendant threatened to kill him if he told of the killing.

Cross-examined, the witness said that he told Mr. Creswell that Bacquet knew of a wilful murder, and that it ought to be investigated. He thinks that he also told Creswell that Bacquet was present when Benton was killed. He denied having told Creswell that Bacquet said that defendant confessed the murder to him.

The substance of the evidence of Elias Dubose, for the defense, was that the defendant stayed all the night of the killing at the house of Mrs. Elizabeth Edwards. There were present at Mrs. Edwards' house during that night, the witness, Miss Mary Edwards, Alice Edwards, afterwards wife of witness, now dead, the widow Harris, afterwards defendant's wife, now dead, Ned Edwards, witness and defendant. Mary Edwards, now Mary Dubose, was sick in bed at the time of this trial, and Mrs. Edwards insane. The witness went to bed at 10 or 11 o'clock, and defendant was then there. He was there early next morning, and witness thinks all night.

Cross-examined, the witness said that he hunted horses next day after the killing until late evening, and with his wife then went to Riddle's. He did not see Riddle until he got to his house, nor did he see Bacquet for three or four weeks afterwards. The defendant was at Mrs. E. Edwards' on Friday evening (the evening of the night on which deceased was killed), and, on Saturday evening, when witness started to Riddle's. Ned Edwards told the defendant of the killing on Saturday evening, and the witness thinks that Ned Edwards went to Yorktown that day, and alone. The witness knew the deceased well, and they were friendly, and took supper together at Mrs. Edwards', where the witness lived, a few days before the killing. There was an indictment against the witness for assault to murder the deceased, but the witness did not know of it until after the death of the deceased. Witness had never been arrested and had given no bond, but, as he was told by the sheriff to do, he went to court. He thinks the indictment has been dismissed. He denied that deceased had ever had a difficulty with him, or with Riddle and defendant, in his presence.

Mrs. Robert Riddle testified for the defense that she was at home on the night of the killing, and heard shots in the direction of Benton's camp, about 9 o'clock. Her husband came home about 9 o'clock that night, after the shooting, and told her he had been on "' Sandies." She was at home all of the next day. No one came to the house until about dark, when Elias Dubose and his wife came. W. C. Bacquet was not at the house the day after the killing, nor did she see him that day.

Cross-examined, she said that her husband, Robert Riddle, having come home on the night before and after she heard the firing, remained at home all next day, Saturday, Saturday night, and Sunday. She did not see the defendant for two weeks after the killing, nor had she seen him in two weeks before, as he seldom came to her house. She is a sister of defendant.

Hon. H. C. Pleasants, trial judge, testified for the defense that the evidence of Mrs. Harris, *nee* Mary Edwards, given at the trial for bail under writ of *habeas corpus*, was corroborative of the testimony of Elias Dubose on this trial. Ned Edwards, on the trial for bail, contradicted the witness Bacquet, and testified then as he said on the present trial he had testified.

The defense introduced the minutes of the court, and showed thereby that at the December term, 1878, the two indictments offered in evidence by the State were dismissed.

In rebuttal Henry Creswell testified that, a short time before the indictment of defendant for the murder of deceased, G. W. Crosson told him that W. C. Bacquet had told him, Crosson, that Bacquet knew of a murder, and that it ought to be inquired into. He further told the witness that Bacquet told him, Crosson, that defendant had told him, Bacquet, that he, defendant, killed the deceased. Crosson did not tell witness that Bacquet said he was present and saw the killing.

On cross-examination, the witness thought but was not certain that Crosson told him that Bacquet said that defendant confessed to him, Bacquet, that he, defendant, killed the deceased. He is certain, however, that Crosson did not tell him that Bacquet said he was present and saw the killing.

It appears by a bill of exceptions that the defense, in connection with Crosson's testimony, proposed to introduce John Waters as a witness, and to prove by him that the deceased Benton, and Bacquet, the main witness for the State, were at enmity and had had a serious difficulty; that Bacquet habitually carried arms for Benton and threatened to take his life.

The jury found the appellant guilty of murder in the first degree, and assessed a life-term in the penitentiary as his punishment.

Staytons, Lackey & Kleberg, for the appellant, filed an able brief.

Horace Chilton, Assistant Attorney General, for the State.

R. Kleberg & S. F. Grimes, also for the State. The inadmissibility of evidence to show threats by a third party to take the life of the deceased for the murder of whom a defendant is on trial, was definitely settled in the cases of *Boothe* v. *State*, 4 Texas Ct. App. 202, and *Walker* v. *State*, 6 Texas Ct. App. 601. The issue of the trial in such cases is the guilt or innocence of the defendant on trial.

Defendant's 7th bill of exception embraces a broad and general objection to the court's charge to the jury, as not being the whole law applicable to the facts in the case. We will first, in connection with the general charge, consider defendant's 8th bill of exception and his special charge refused by the court, which defendant deems part of the law applicable to the facts of the case, as defining the rule of law that the testimony of a *particeps criminis* must be corroborated, etc. It is a well settled principle of law that, in order to necessitate a particular instruction, the issue must arise fairly and naturally from the evidence, without remote and strained presumption; and from all that appears on the face of the record of this cause the relation of principal or accomplice between the State's witness and the accused did not exist. The mere hearsay testimony of G. W. Crosson as to Bacquet's statement outside of court, that he, Bacquet, was near enough to hear and see the shooting, does not create such a relation; and does not necessitate an instruction on that point. The testimony of G. W. Crosson, if it were competent to show that Bacquet was a principal or accomplice, would show the very reverse, and prove conclusively that Bacquet was an accidental witness whom defendant, when he discovered him, threatened to kill — a witness who begged for his life when he was detected by the defendant, after he, defendant, had committed the murder, and whom defendant only spared on the condition that he would never tell.

The concealment (says Mr. Wharton on Homicide, 2d edition, secs. 345–46) of the knowledge that a felony is to be committed will not make the party concealing it an accessory before the fact, nor will tacit acquiescence or words which amount to a bare permission be sufficient to constitute this offense. But we take it that the testimony of G. W. Crosson can have but one legal significance, and that it is to contradict generally the testimony of W. C.

Bacquet by statements which said Bacquet had made to said Crosson outside of court. In every other sense it was hearsay and could not be used to show that the said Bacquet was an accomplice. *Krebs* v. *State*, 8 Texas Ct. App. 27. Defendant's special instruction, then, while it clearly indicated the theory of the defense, had no application to the facts, and was no part of the law of the case.

HURT, J. John Dubose was charged with the murder of James Benton; was tried and convicted of murder of the first degree, and his punishment assessed at confinement in the penitentiary for life. There are a number of points raised by the assignment of errors; but we think that the determination of three will be all that is necessary to a proper disposition of the case.

1st. Under the surroundings of this case, had the defendant the right to show motive, threats and opportunity on the part of the State's witness Bacquet to kill the deceased?

2d. Was the defendant, under the circumstances in this case, entitled to prove facts and circumstances tending to fasten guilt upon some other person?

3d. Did the court err in charging the jury, that "In every criminal prosecution the accused is presumed innocent until his guilt is established by legal evidence, and the burthen of proof must rest upon the State, and does not shift till the State has proved, to the satisfaction of the jury, the facts which constitute the offense charged, and when this is done it then devolves upon the accused to establish that upon which he relies to excuse or justify the prohibited act?"

First proposition. One Bacquet was a very important, in fact, the main witness for the State. Besides his evidence there is no fact tending to produce anything more than a bare suspicion against the defendant. The record contains some evidence inculpating this witness. The defendant offered other evidence upon the trial, tending to connect this witness with the murder. This evidence consisted of motive, threats and opportunity to kill the deceased Benton. To the introduction of these facts the State objected, and the court below sustained the objection; to which ruling the defendant excepted and reserved his bill of exceptions.

If the witness Bacquet were an accomplice, the defendant could not be legally convicted upon his evidence, unless corroborated in a certain manner; and if this corroboration failed, no conviction could be had on the evidence of this accomplice. The defendant's guilt may have depended entirely upon this fact; hence the proof of this fact, to wit, that Bacquet was an accomplice, is a full and complete defense to the prosecution. Again, if there was no corroboration as the law requires, a doubt as to whether he was *not* an accomplice would have been a good defense; for a doubt of a fact upon which guilt *necessarily* depends is a doubt of guilt.

The defendant having clearly the right to show that the witness Bacquet was an accomplice, by what character of evidence must he prove it? Is he confined to positive evidence, or may he enter the field of circumstances? He would have the right to attack, with every character and description of legal evidence, any other fact upon which his guilt depends. Why restrict in this case? If successful, is not the defense made legal by the law of the land? There being none against, but, in our opinion, every reason in favor of, a full and complete range of investigation, we are of the opinion that, to establish that the witness was an accomplice, the defendant had the right to introduce every character of evidence, whether positive or otherwise, which would have been admissible if the witness had been on trial for the murder. This will be again referred to and more fully noticed below.

The second proposition: "Was the defendant entitled, under the peculiar character of this case, to introduce evidence tending to prove that some other person killed the deceased?" This is a case of circumstantial evidence, except the confessions sworn to by Bacquet. The authorities are divided upon this subject, and we think the weight is against the admissibility of the evidence. Later decisions, however, are leaning in its favor. The question with the writer is,—"Upon which side is reason and justice? for, it being impossible to reconcile the authorities, we must look to the reason and analogies of the law for a proper solution of the subject. As preliminary to the main point, we will here state that, in a case in which the killing by defendant is not the vital issue, it being conceded, this evidence would be inadmissible. But the issue being, did the *defendant* kill the deceased, under this issue is this proof competent? We think, by a plain and simple illustration, its admissibility can be demonstrated.

Suppose that A is indicted for the murder of B. Upon the trial the State proves by two witnesses that they were present at the homicide, and saw A kill B. B denies the killing, and proposes to prove by a witness who was also present that C killed the deceased. Would any court hold that this evidence was not admissible? Certainly not. Now suppose the State were to propose to prove that A had a motive for, and threatened to kill B. This would be clearly admissible, not only for the purpose of proving malice, but to strengthen and corroborate the evidence for the State "that A did the killing." The State having drawn upon motive and threats, the defendant would have the same right, and could, therefore, prove motive and threats on the part of C to kill B.

But suppose that the State leaves positive evidence and enters the field of presumptions from circumstances,—the case being one of circumstantial evidence alone,—can not the defendant follow in her wake, and enter the same field, and show by circumstances that C did the killing? Again:—B is found dead on the roadside (suicide being out of the question), killed with buck-shot; the State proves that the defendant was seen leaving rapidly from the direction of the body, and that he had a strong motive and had seriously threatened to kill B; that he was armed with a shot-gun, and a number of other suspicious circumstances surrounding him. He fails to explain these inculpatory facts. With these facts the State seeks to convict him. Upon the trial the defendant proposed to prove that C was seen going rapidly from the direction of the body, and with a shot-gun, and that he had also a motive and had seriously threatened to kill B. The physical facts, at the place of the murder, show that but one person did the killing. The defendant is not permitted to prove these facts and is convicted. The State then prosecutes C, and as he could not be allowed to show the facts upon which the first defendant had been convicted, he would also be convicted. It being certain that but one person did the killing, this illustration demonstrates that a terrible wrong has been committed upon one of these parties.

The grand and fundamental error, in this whole matter, consists in the fact that courts proceed upon the idea that absolute certainty can be attained by means of circumstantial evidence. And strange to say, they give to and surround circumstantial evidence with more sanctity and infallibility than is accorded to positive evidence. For we have found that, when the State relies upon positive evidence, the defendant may, by the same character of evidence, show that some other person killed the deceased. There is another peculiarity attending this subject; which is that the circumstances in *behalf* of the State are those which cannot be attacked by *other circumstances.* This process of reasoning leads to the conclusion that the probative force of a fact depends upon which side proposes to use it; or, to present it in a different shape, if C were on trial these same rejected facts would become pregnant inculpatory facts, but as the defendant and not C is on trial, they lose their probative force and become immaterial.

By reference to *Walker* v. *State*, 6 Texas Ct. App. 601, *Boothe* v. *State*, 4 Texas Ct. App. 202, and a long list of cases sustaining these decisions, it will be found that this proposition is stated, "That the issue of the trial was the guilt or innocence of the *defendant* on trial." This position would unquestionably be correct, if the guilt of another person, in no state of case, could tend to weaken the evidence adduced against the defendant. The guilt of the defendant is the issue in every criminal prosecution. The proposition asserts nothing from which any conclusion can be made bearing upon the question. To our mind it is assuming and begs the question. Who will assert that there are no cases in which, if the guilt of another were shown, the case as made by the State against the defendant would not be completely crushed? But such investigation, with reference to other parties than the accused, should not be permitted in cases either positive or circumstantial, unless the inculpatory facts are such as are proximately connected with the transaction. In other words, to show remote acts or threats would not be admissible unless there were other facts also in proof, proximately and pertinently connecting such third party with the homicide at the time of its commission. If, then, the guilt of another party is an attack upon, or raises a doubt of, the truth of the case as made by the facts against the defendant, evidence tending to prove this guilt is clearly admissible. The office of evidence is to satisfy the mind of the truth of a given proposition, and in criminal prosecutions that proposition is always the guilt of the accused.

There is an inconsistency, glaring and patent, in relation to this subject. If the case be one of positive evidence, the defendant is permitted to prove by positive evidence that some one else did the killing. Would not the guilt of the *defendant* on trial *be the issue* in that case? Certainly. The effect of positive proof that some other person killed the deceased is to draw in question or surround with doubt the affirmative proposition "that the defendant killed the deceased." If the case made by the State with positive evidence can thus be met, why not, in cases purely circumstantial, permit the defendant to meet the case by the same character of evidence, and show that another committed the homicide? Can the conclusion drawn from circumstantial evidence be more certain than that made from positive evidence? We think not.

We are, therefore, of the opinion that, when the issue on the trial is whether the *defendant* did the killing, he has the right to show that some other person committed the homicide, by the same character of evidence relied upon by the State for a conviction. If, however, the facts show that more than one person participated in the homicide, this evidence would possess no tendency to weaken the case as made by the State, and should therefore be rejected, unless under peculiar circumstances which we will not attempt to give at this time. A most excellent statement of the rule is made in *Means* v. *State*, decided at this term by our presiding judge. (*Ante*, p. 16.) It is thus stated: "The rule is that such evidence affords no reasonable presumption or inference as to the guilt or innocence of defendant, and it is generally treated as hearsay or *res inter alios acta.* Of course the rule has its exceptions, but they can exist only in cases where the evidence is wholly and strictly circumstantial, and where, the mind having nothing to rest upon, seeks knowledge and light from every source, however dim, calculated to throw light upon the transaction."

The exception is made in cases purely circumstantial. Suppose, however, that the State relies in the first instance upon positive proof, and the defendant meets that proof with positive evidence that some other person killed the deceased; now, in corroboration of their witnesses either party would have the right to prove motive, threats, and in fact all other inculpatory facts. The parties having left the field of positive evidence, and entered that of circumstantial, the rule as stated by the presiding judge does not conflict, but is in accord with the admissibility of the evidence in the illustration last made. See the case of the *United States* v. *Hartwell*, 3 Clifford, 221, for a departure from the old rule on a question analogous to this. Also *Means* v. *State*, decided at this term, *supra.*

The third proposition is, did the court err in charging the jury "That in every criminal prosecution the accused is presumed innocent until his guilt is established by legal evidence, and the burthen of proof rests upon the State, and does not shift till the State has proved, to the satisfaction of the jury, the facts which constitute the offense charged; and when this is done, it *then devolves* upon the *accused* to *establish* the facts upon which he relies to *excuse* or justify the prohibited act." It then devolves upon the accused to *establish the facts upon which he relies*, etc. In order to prove or establish a fact it must be done by evidence sufficient to lead a jury to believe it, and for this reason it must outweigh or preponderate the evidence which it is adduced to meet and control. Here, then, we have two affirmative propositions in one criminal case; first, the State must prove the facts constituting the offense charged; and second, then the defendant must satisfy the jury that these facts are not true,— take the burden, and convince the jury that the case as made by the State's evidence is untrue.

The "facts upon which he relies to excuse or justify" must be established; this unquestionably means that they must be proved, and, if they must be proved, a preponderance of evidence in their favor must be adduced by the defendant. They may have been of sufficient strength to have created a reasonable doubt of the truth of the facts relied upon by the State, but this would not be establishing or proving them. It cannot be questioned that it devolves upon the State to establish by evidence the guilt of the accused beyond a reasonable doubt, and that the defendant, by his plea of not guilty, puts in issue every material allegation in the indictment. Now, is he required to plead specially any matter of justification or excuse? There is but one affirmative proposition in the case, and that is the guilt of the defendant. It is not divided into two parts; one of guilt as charged by the State, and the other of innocence supposed to be asserted by the defendant. He does not affirmatively plead that he is innocent, but denies that he is guilty, and the case is tried upon that issue throughout. The jury are not required to believe him innocent in order to acquit; the question is guilt, and not innocence; and this issue is affirmative in its very nature, and continues so throughout the whole trial. The correct principle is that when the defendant relies on no separate, distinct and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout with the prosecution.

What independent, separate and distinct fact was relied upon by the defendant in this case? None whatever. The issue, the struggle throughout the whole trial, was as to whether the *defendant* killed James Benton. There is not the slightest hint in the whole record at an excuse or justification of the killing. The theory and the only theory of the defense was that the defendant did not kill the deceased. The effect upon the rights of the defendant must have been terribly damaging, indeed, from such a charge. It presupposed that the defendant had killed the deceased, and called upon him to excuse or justify; thus assuming the existence of the very fact upon which the whole fight was made. The jury were in effect told by this charge that the State has shown that the defendant killed the deceased, and it now devolves upon him to excuse or justify the killing; thus assuming the very fact in issue in favor of the State, and shifting the issue to something else not presented by the evidence, nor thought of by the defense. We are, therefore, of the opinion that this charge was not proper under the case, as made by the evidence. *Wingo* v. *State*, 66 Mo. 181; *Stokes* v. *People*, 13 American Rep. 492; *Mohaher* v. *People*, 10 Mich. 212; *State* v. *Morphy*, 33 Iowa, 270; *State* v. *Norten*, 34 Iowa, 131; *State* v. *Underwood*, 57 Mo. 49; American Criminal Law, sec. 707; *Commonwealth* v. *McKie*, 1 Gray, 61; *Ake* v. *State*, 6 Texas Ct. App. 398; *Ainsworth* v. *State*, 8 Texas Ct. App. 532.

We will not discuss the question as to whether this or a similar charge can properly be given in any case, except in those in which an independent, separate and distinct matter is interposed. The writer is of the opinion that it is not permissible in any case, unless such matter is relied on. That this charge in this case is not proper is held by all the judges of this court.

For the errors above pointed out, the judgment is reversed and the cause remanded. The other points raised by the assignment of errors will not likely arise again.

Reversed and remanded.

SALLIE WALLACE *v.* THE STATE.

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28 306

1. MURDER — INDICTMENT — EVIDENCE.— An averment in an indictment for infanticide that the deceased infant was a female is of that class of averments known as descriptive, and it was incumbent on the State to prove it.
2. HOMICIDE, as defined by the Penal Code of this State, "is the destruction of one human being by the act, agency, procurement, or culpable omission of another;" but it is further provided that the person upon whom the homicide is alleged to have been committed "must be in existence by actual birth." An infant cannot be the subject of homicide until its complete expulsion, alive, from the body of its mother.
3. INFANTICIDE — EVIDENCE.— Physiology and obstetrics have established the position that the respiration of a child, after the parturition is complete, demonstrates that the circulation of its blood is independent of its mother, and shows its individual existence. But, as respiration may occur before the parturition is complete, it does not of itself suffice to prove the independent circulation and individual existence of the child. See the opinion *in extenso* on this subject.
4. SAME.— Note evidence which, in a trial for infanticide, is held insufficient to prove the existence of the child independent of its mother at the time the violence was inflicted upon it.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

The present appeal is the third taken by the appellant from convictions for murder in the second degree, with a term of five years in the penitentiary assessed as the punishment by each of the verdicts. In the 7th and the 9th volumes of these Reports, at pages 570 and 299, respectively, the case will be found as reported upon the former adjudications in this court; and in the former of these volumes will be found a condensed statement of the evidence material to the case as then presented.

The evidence in the present record is more full and elaborate than that brought up in the former ones, especially upon the important physiological questions discussed in the opinion, and a detail of it is now required by the ruling that it is insufficient to establish affirmatively the independent existence of the infant.

The indictment was filed May 8, 1879, and charged that Sallie Wallace, on the 21st of the preceding March, being big with a female child, "did bring forth said child alive, of the body of her the said Sallie Wallace, alone and in secret, and, said female child being then and there alive, the said Sallie Wallace, on the said 21st day of March, A. D. 1879, as soon as the said child was born, said child then and there being alive as aforesaid, with force and arms did then and there, in and upon the said female child, unlawfully, wilfully and feloniously, and of her malice aforethought, make an assault; and that the said Sallie Wallace, with both her hands about and around the neck of her the said female child, then and there a strong domestic string, of no value, unlawfully, wilfully and feloniously, and of her malice aforethought, did fix, tie and fasten; and that the said Sallie, with the domestic string aforesaid, fixed, tied and fastened as aforesaid, her the said female child unlawfully, wilfully, feloniously and of her malice aforethought, did choke, suffocate and strangle; of which choking, suffocating and strangling she the said female child then and there instantly died; and so the grand jurors aforesaid, on their oath aforesaid, do say that the said Sallie Wallace her said female child in manner and form aforesaid unlawfully, wilfully, feloniously and of her malice aforethought did kill and murder; contrary," etc. The trial resulting in the present appeal was had on December 21, 1880, and the record on the appeal was sent to the Galveston branch of this court at the instance of the counsel for the State.

The first witness examined by the prosecution in the court below was Elizabeth Williams, a colored woman, who, with her husband Cæsar Williams, lived at Robinsonville, a village in McLennan county, about six miles south of Waco. She testified that one Thursday evening on or about March 20, 1879, the defendant, a colored woman, who was then a stranger to witness, came to her house, walking and barefooted. She told witness that her name was Sallie Wallace, and stayed for supper, but ate little. At bed-time she said she believed she would spend the night with witness, who arranged a bed for her, and she retired. When, about daylight the next morning, witness called to the children, the defendant answered and said she would get up and go over to Mrs. Weekly's, a neighbor. She went out but returned after a while. At breakfast, about sunrise, she took a little coffee, but would eat nothing else. Near the bed occupied by the defendant, witness noticed a spot of clotted blood, and had defendant to clean it up. After breakfast, witness' husband went off to his day's work, and witness went to the cow-pen, accompanied by the defendant. When witness had about finished milking, the defendant said she believed she would go down to a branch which was about a hundred yards distant, and look for a hen's nest Mrs. Weekly had given her if she could find it. She left witness, who, in about half an hour, saw her head above some bushes near the branch. This was the last seen of the defendant by witness until some three months afterwards, when witness was called to testify at the first trial of this case. The defendant, when at witness' house, had a full breast and belly, showing every indication of pregnancy. At the cow-pen her appearance indicated the early stages of labor, as the upper portion of her belly seemed to be sinking and the lower protruding. Witness told her she was in no fix to be away from her mother, and ought to go home at once; to which she replied that she was going home, and that she supposed all young women had to get in that condition at some period of their lives. When witness returned from the cow-pen to the house she found that the bed where defendant slept was bloody, as well as the floor near it. Both of the sheets were stained with blood. The next day, about two or three o'clock, witness and Fannie Mucker went down upon the branch, and at the spot where witness had seen the defendant's head they discovered the body of a fat, plump, full-termed, little colored child. They raised an alarm which brought nearly everybody in the village down to see the child. It lay in a little scratched-out place, and some leaves and sand had been thrown around it. It was lying on its back, with its eyes slightly open, and something had eaten a portion of its cheek. It was a large, mature, well developed child, with a full head of hair and well matured finger nails. Around its neck was tied a strong string made out of a piece of domestic. The string had been passed twice round the neck, and tied in a knot behind the neck. Close by lay the afterbirth, and also an apron which the defendant had on at witness' house.

Cæsar Williams, for the State, corroborated the testimony of his wife in many particulars. He and many others viewed the body as it lay where it had been found, and he gave a very similar description of it to that given by his wife. He added that the string was very tight around the child's neck, and that the apron found near it, and previously worn by the defendant, was made out of blue checked domestic. He covered the body with a tub, and went to Waco for the coroner, who came out the next day and held an inquest.

Albert Cole, for the State, testified that he saw the defendant one Friday night in March, 1879, at her mother's house in McLennan county. She was sick, and witness supposed she had had a child. She had been arrested, and he was employed by a constable to guard her. On the next Thursday night she got away from him and ran off, but was afterwards brought back. It appears by the testimony of this witness that there was a child of the defendant, three or four years old, living at her mother's.

P. Sparks, for the State, testified that he captured the defendant after her escape from Cole, and brought her back to Waco. She did not seem sick when he found her, which appears to have been but a very few days after her escape. Witness had employed the defendant and said she was a good worker. She had supported the child still living at her mother's, and had taken care of another one which had died of fits.

Dr. Tate, for the State, testified that in March, 1879, the jury of inquest called on him to examine the body of a negro child found near his house in Robinsonville. He cut into the body and took out a piece of the lung about as large as two of his fingers, threw it into a pan of water, and it floated. This being sufficient to satisfy the jury, he made no further examination. The child was evidently a full-termed child, would probably have weighed seven or eight pounds, and had a full head of hair and growth of nails. The test made by the witness, taken with the other evidence at the inquest, satisfied him that the child had breathed, and that the string was tied around its neck after complete birth. There was a domestic string wrapped twice around the child's neck, and tied tight in a hard knot at the back of the neck; "from which fact," added the witness, "it might possibly be concluded that the string was tied after the birth of the head and before the birth of the rest of the body." The string pressed into the flesh, but witness observed no swelling or congestion of the face. The child was not decomposed, but something had eaten part of the cheek. The string was tied tight enough to have strangled the child, but witness could not say positively whether it was tied on the child before or after complete birth. Witness observed no signs of strangulation, which are swelling of the face and protrusion of the tongue and eyes, but these signs would be less observable in a negro than a white, and less in a child than an adult. The test applied by witness is called the hydrostatic test, and is the best known to medical science in determining whether air has entered the lungs. It is not infallible, there being other conditions which will produce a similar result, such as artificial inflation, emphysema, and putrefaction. Witness noticed no emphysema, and artificial inflation is usually effected with instruments. There were no signs of the use of instruments in this case. In the absence of indications to the contrary, the hydrostatic test is almost conclusive that the child had breathed. Witness was confident that this child had breathed either before or after birth, but could not say whether before or after, nor whether the string was tied around its neck before or after its birth. Still-born children always have their eyes closed, and if a child was killed in its mother's womb, its eyes would be closed at its birth. The color of this child's lungs was red, and this was an indication of life. If they had no air in them they would have been dark. Lungs will not float unless air had entered into them. Generally the head of a child is born first, and with the face downwards; from which it might in the present case be concluded that the string was tied before the complete birth of the child; but, considering a woman's pains in such an emergency, it was hardly probable. The interval between the birth of a child's head and its complete birth is variable from a few seconds to a much longer time.

Dr. J. S. Willis, for the State, testified that he was county physician in March, 1879, and in that capacity went to see the defendant at her mother's, seven or eight miles from Waco. Defendant bore evidence of recent confinement, and was affected with inflammation of the womb incident to exercise after recent confinement. Witness made a digital examination of the womb, and is positive that she had very lately given birth to a child. This was a day or two after the dead child was found at Cæsar Williams' house. This concluded the evidence for the State.

The defense introduced Dr. Park, who stated that the hydrostatic test is accurately made by putting the whole of the lungs in water, to see if they would float. Next, portions about the size of two fingers are cut from different parts of the lungs, to see if they will float. Then these pieces are cut up, to see if the pieces will float, and whether bubbles rise when they are squeezed under the water. Notice should be taken whether the pieces crepitate when pressed, or even when only sufficient pressure is used to lift them up. If they float and crepitate under these circumstances, the test gives evidence of air in the lungs, and that they have been inflated by breathing. The breathing may have taken place before complete birth, as well as after, and the test is incapable of indicating when the inflation took place. Even when properly applied, the test is not infallible, but it is the best criterion known to the medical profession. If the child breathed before complete birth, and when or even before the head was expelled, the phenomena afforded by the test would be the same as if the breathing had occurred after complete birth. As soon as a child is born, it generally cries, and this is its first act, and one which it cannot accomplish without having air in the lungs by breathing. It can cry before complete birth, with the head only out of the vulva, or even before the expulsion of the head. Instances are recorded where children have cried in the womb, but only when the vagina had been opened by the hand or otherwise. In such a case the lungs of a child, if it were killed before complete birth, would give the same results as if complete birth had preceded death. As a rule, and with the best attention, one child dies in every twenty to twenty-seven births. The fatality is still greater in cases of illegitimacy; the ratio in which is one in fifteen or sixteen. Negroes have children easier than whites, and with less danger to their offspring. In negroes the signs of strangulation are less observable than in whites, and less in children than in adults; but the signs, which are congestion of the head and face and protrusion of the eyes and tongue, are always present in strangulation. As a rule the body of a child follows the birth of its head within two or three minutes, or half an hour, but the witness did not consider a labor of four to six hours a long one. A child is usually born with its face towards the mother's back, and generally begins to breathe the moment the head is expelled. Taking such a case as Dr. Tate had stated in his testimony, it was the witness' opinion that the defendant's child came to its death from strangulation caused by the string around its neck. Women sometimes get through labor with but one pain, and a negress would be more likely to do so than a white woman, particularly if she had previously had children. In the witness' experience he had known but one such case.

Dr. Manning, for the defense, testified that he had heard a child cry in its mother's womb before even the head had been expelled, and though no hand, instrument, or other appliance had previously been used in disturbing the parts or aiding the birth. He had experienced but one case of the kind, but others are recorded in medical words.

C. Stubblefield, for the defense, testified that the defendant had been in his employ prior to about March 20, 1879, when she came to him and said she was pregnant and would soon be confined, and that he would have to get another servant. Thursday morning, the day before he settled with her, she was occupying a room with one Emma Davis, a negro woman who was subject to fits. Witness, hearing a noise before day, went into the room and found Emma in one of her spells. She had hold of the defendant, who was badly frightened. Witness separated them and returned to his own room, but, soon hearing the noise again, he went back to their room and found the two women in a violent scuffle. Witness separated them again, and, while he was trying to hold Emma, the defendant started to run out of the room, but fell down the steps after reaching the door. There were three or four steps to the door. Witness stated that the defendant was a good servant. Instead of trying to conceal her pregnant condition, she told him that was her reason for leaving his employ, as she desired to go to her mother's to be confined.

The foregoing is in substance, though somewhat abbreviated, the statement of facts as presented by counsel to the trial judge, who, in his certificate, made some additions. The most material of them were that Dr. Tate testified to the crepitation of the child's lung, and to the absence of decomposition; and that Dr. Park did not state that in every case of strangulation all the signs were present, nor that the tongue was always protruded.

Though this court reverses the judgment of conviction on questions of evidence, it will be observed that it sustains the charge given to the jury by the court below, and quotes so much of it as appears to be necessary here.

C. B. Pearre and *Herring, Kelley & Williams,* for the appellant. The court erred in refusing to charge the jury as asked by accused, "To constitute a human being in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with its mother be severed or not."

The question upon which hinges the proof of appellant's guilt is embodied in this charge. Only reasonable creatures *in being* are subjects of murder. Such creatures are *in being* when wholly *born alive.* The *extent* of birth is defined by our Code to be *actual* birth. The court below, recognizing the necessity of explaining to the jury what *actual* means, our Code being silent, very properly goes to common law authority and draws therefrom the accurate idea of *complete expulsion* of the child from the body of the mother. If this had not been done the jury would have doubtless thought, as even one of the expert physicians did, that the protrusion of any part of the body of the child was *birth.* The court realized the necessity of defining this technical expression, and warned the jury not to stultify themselves by finding *birth* to mean the partial parturition vulgarly considered birth. Why the court did not think fit to advise the jury on the other element of the technical expression *in being*, cannot be imagined. *In being* includes *birth* and LIFE. The court could not define *birth* from our Code: for no attempt is there made to do so. Access was had to the old law, sustained by a long line of authorities and decisions for its explanation, and, when found, was very sensibly followed.

For the definition of life, the Code being again silent, resort must be had to the same source, which says it is where parturition has been completed and respiration and circulation of the blood independent of the mother begun. 1 Wharton's American Criminal Law, § 748; *Rex* v. *Enoch*, 5 C. and P. 539; *Rex* v. *Trillor*, 1 C. and M. 650; 3 Greenl. Ev. § 136; 2 Wh. and St. Med. Jur. part 2, p. 1081, § 1209; Taylor's Med. Jur. 346; Dean's Med. Jur. 140, and cases cited on pp. 141 and 188. Also and especially see *State* v. *Winthrop* (43 Iowa, 517), 22 American Reports, 257.

Erskine, J., in *Rex* v. *Trillor*, above cited, said: "If you are satisfied this child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully and of her own malice aforethought strangled the child after it had been so produced, and while it was still alive, and while it had, according to the evidence of the surgeon, *an independent circulation*, I am of opinion the charge is made out." To make out the charge, according to the old common law, an independent circulation must be proven. A child is not a creature in being until it has been wholly born, born alive, and a circulation of the blood independent of the mother set in.

We are told by the medical experts that a child may breathe before birth, or may be born alive and live for a greater or less length of time without breathing, after which it has been known to breathe and live; that, in other words, varying phenomena are observable in and immediately following parturition. From this uncertainty a rule of law must be evolved, some definite, prescribed rule, by which it is to be determined what should, in criminal and in civil proceedings, constitute being born alive. Criminal and civil proceedings are contrasted, for the reason that the rule of law in one differs from that prescribed for the other. "In a celebrated case of tenancy by courtesy (*Fish* v. *Palmer*, 1806, post-birth), the judges of that time held," says Taylor's Medical Jurisprudence, 346, "that the quivering motion of a lip after birth, without respiration, independent circulation, or any other sign of vitality, was sufficient to show that the child was born alive, and that it had thereby acquired civil rights, which it could transmit to others,—its heirs. Why is proof of independent circulation in a child to be demanded of medical witnesses in a case involving a question of its murder, when, in respect to its acquisition of civil rights, such proof is not called for?" If attention is directed to the child alleged to have been murdered, there would seem to be no good reason for paying greater seeming respect to the protection of its rights of property than of its right to personal security. But such is not the object of inquiry. The criminal law, unlike the civil, does not undertake to redress any wrong inflicted on the dead child, but to protect society and throw around its alleged murderer all the safeguards necessary to a fair trial, in which her presumed innocence must be rebutted by evidence establishing her guilt beyond reasonable doubt. In civil causes touching the rights of property, the preponderance of evidence must decide the issue. For the quiet and the well-being of social order, either the plaintiff or the defendant must be granted the matter in dispute, and to attain that end it is necessary to be guided by this rule. Hence the law that the preponderance of evidence should turn the scale to the credit of him who, in a right pertaining to courtesy, could introduce even so slight a circumstance as the tremor of a lip, or the contraction of a muscle, in support of the justice of his pretensions.

Far different is the rule in criminal prosecutions. In the one case the jury are left free to weigh the evidence adduced, and by the most delicate distinctions pass between their fellows and mete out their respective rights. In the other, knowing the varying phenomena of childbirth, the law hedges the possibly innocent defendant with thoughtful, precautionary guards, by which the benefits of doubts are legally solved in her favor. With this object in view, a presumption of law exists, and is clearly enunciated in all the authorities to which access has been had, that proof of independent circulation must be established before, as Justice Erskine says, "the charge is made out."

Following these precedents, 1 Wharton's Amer. Cr. Law, § 748, says: "The weight of authority now clearly is, that in cases of alleged infanticide it shall be clearly proven that the child had acquired an *independent circulation* and existence, and it is not enough that it had breathed in the course of its birth."

Being referred by our Code to the principles of the common law, where our statutes are silent, we might confidently rely on the quotations already made—certainly upon the opinion of Mr. Wharton, just cited—to establish the law as set forth in the charge asked by the defendant, and refused by the court below. However, "to make assurance doubly sure," reference is had to *State* v.

Winthrop (43 Iowa, 519), 22 American Reports, 257, where may be found the identical charge asked by defendant, and in substance, the deficient, not to say erroneous, instructions given on the trial of the present cause. The judgment was reversed on this identical ground, and an able discussion of the law embodied in the opinion, fixing the rule and freeing Iowa from that uncertainty which is ever deprecated in the jurisprudence of any society. In reversing this cause on the present appeal, it is respectfully urged that the court express an opinion on this point, that the defendant may have the benefit of the legal protection which has been heretofore denied her. In *Winthrop's* case the court below seems to have assumed that a child may have independent life without respiration and independent circulation of the blood, and such was the view of the court below on the trial of this cause. The attorney general, in *Winthrop's* case, denied the possibility, but thought the existence of life presumes the existence of respiration and independent circulation. On the one hand the court below supposed independent life could exist without independent circulation; on the other hand the attorney general supposed proof of life carried with it proof of independent circulation. The first idea is held to be erroneous; the second, to declare a truth of no importance, since there is no means of proving life in an infant, never seen alive by witnesses, except by first proving independent circulation.

A child has actual independence of its mother when it has the adult circulation of the blood after complete birth; it has *potential* independence when it exists only through the *fœtal* circulation, though completely born. It is not yet independent but lives through its mother; *is a part of her.* But when adult circulation sets in, the umbilical cord ceases to be the channel for the transmission of the life-sustaining element, and the blood takes an entirely different course in the body of the child, confining itself to the child, and no longer returning to the *placenta.* Whether the cord be severed, or not, in this state of the circulation matters not, the child being actually independent; whereas before, it was only potentially independent. Hence, a child which has been completely born but still has only *fœtal* circulation may have power to establish new life upon its own resources antecedent to the actual enjoyment of this new life. The court below seemed to think the killing of such a child would, and could be proven to be, murder.

Adams, J., in Winthrop's case, cites approvingly *Rex* v. *Enoch,* 5 C. and P. 539, as follows:

"The child might have breathed before it was born, but its having breathed is not sufficient life to make the killing of the child murder. *There must have been independent circulation in the child,* or the child cannot be considered alive for this purpose," though in civil actions the rule would be different.

In *Regina* v. *Trillor,* 1 Car. and M. 650, Erskine, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully and of malice aforethought strangled the child, after it had been so produced, and while it was alive, *and while it had an independent circulation of its own,* I am of the opinion the charge is made out against the prisoner."

3 Greenleaf Ev. § 136, says: "To support an indictment for infanticide, at common law, it must be clearly proved that the child was wholly born, and was born alive, *having an independent circulation* and existence. . . . Neither is it material that it is still connected with the mother by the umbilical cord, if it be wholly brought forth and have an *independent circulation.*"

1 Wharton Amer. C. Law, § 748, says: "The weight of authority now clearly is that in cases of alleged infanticide it shall be clearly proven that *the child had acquired*

an independent circulation and existence, and it is not enough that it had breathed in the course of its birth."

"It may be asked," continues Adams, J., in Winthrop's case above cited, "why, if there is a possibility of independent life, the killing of such a child might not be murder? The answer is, that there is no way of proving that such possibility existed, if actual independence was not established. Any verdict, based upon such finding, would be the *result of conjecture.*" The jury should have enjoyed the guidance of this clear rule of law in their deliberations on this complicated subject.

Horace Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was tried and convicted for the murder of her infant child, and her punishment assessed at confinement in the penitentiary for the term of five years. The indictment charges that the child was a female. The defendant moved for a new trial upon the ground that the evidence did not support the verdict. We have carefully examined the statement of facts, and found no evidence in support of the allegation "that the infant was a female." This averment being descriptive of the child, it must be proven. It is unnecessary to cite authorities upon this proposition; they are almost unanimous in its favor.

Counsel for the defendant, in their brief, desire an opinion of this court upon a question which appears in this extract from their brief: "Repeated trials of this cause have resulted in three convictions and one hung jury. Two appeals have been already prosecuted and as many reversals had. During the whole progress of the case, however, there has been a difference of opinion on the part of the court below and counsel for the defense touching the law bearing peculiarly upon the crime of infanticide, as set out in the charge and marked exhibit

B. From this difference of opinion, to a great degree, has resulted a persistent defense, which has been based upon the theory that the State is required to prove, in prosecutions for infanticide, that there had existed in the child alleged to have been killed a circulation of the blood *independent* of the *fœtal circulation*, and independent of the mother. The discussion of the question has been *evaded* in the opinions of this court heretofore rendered, reversing former judgments. It is believed that a definite settlement of the proposition of the law above enunciated will result in a virtual acquittal of the defendant, and the removal of the cause from the docket of the court below, which has unnecessarily entailed no little expense upon the county." If we comprehend the counsel, we will try not to evade, but to solve the very difficult proposition propounded.

"Homicide is the destruction of the *life* of one human being by the act, agency, procurement or culpable omission of another." The human being whose life is destroyed, of course, must be living. But, as a child lives in its mother's womb, and as the destruction of its life while thus living may be held homicide, our Code provides that "the person, upon whom the homicide is alleged to have been committed, must be in *existence* by *actual birth*." Penal Code, art. 545: This evidently means a complete expulsion of the child from the body of the mother, alive. Being thus expelled, and living, it is then and not till then the subject of homicide.

No witness being present, and the State having to rely alone upon circumstantial evidence, what evidence can and must be adduced to show life after actual birth, as above explained? Right at this point, if we understand counsel, it is insisted that proof of an independent circulation must be made, and that it (independent circulation) does not follow from proof of respiration. Let us concede, for the sake of the argument, that to be a creature in being, separate and independent of its mother, the child must have an independent circulation; is not proof of respiration conclusive of independent circulation? We think so. Therefore it follows that if respiration is shown after birth, independent circulation is also established. Writers upon this subject, it is true, speak of the necessity of showing independent circulation; but it will be found that circulation is not questioned by a respectable authority if the child is shown to have breathed after birth.

The relation which subsists between the circulatory and respiratory systems of the new born child, and the dependence of the former upon the establishment of the latter, have been settled beyond surmise by the researches of physiologists and accoucheurs. Immediately after its birth, and under the operation of influences not well understood, the infant breathes, and, the hitherto compressed air tubes and cells becoming distended with atmospheric air, expands the chest. The first act of respiration is described as exercising a *suction* force, by which the blood is directed from the channel through which it had flowed before birth, and is drawn to the lungs by means of vessels designed for that purpose. The first breath drawn by the child after its birth determines the circulation independent of its mother. The act of breathing is held by all physiologists and accoucheurs as constituting incontrovertible evidence of the individual existence of the infant, and, therefore, the accomplishment of its independent circulation. In support of these propositions we cite the following authorities: Marshall's Outlines of Physiology (edition of 1868), p. 980; Dalton's Treatise on Human Physiology, 5th edition, p. 704; Foster's Physiology, edited by Reichert, 3d edition, p. 923; Flint's Physiology of Man (1874), Vol. 5, p. 442; Carpenter's Principles of Comparative Physiology, 4th edition (1854), p. 291; Gray's Anatomy, Descriptive & Surgical, 5th edition, p. 768; Wilson's Human Anatomy, edited by Gobrecht (edition of 1858), p. 594; Theoretical & Practical Midwifery by Caizeaux, annotated by Fornier, 6th Am. ed. by Bullock (1875), p. 235; Leishman's System of Midwifery, 2d edition, edited by Parry (1875), p. 138; Playfair's System of Midwifery, edited by Harris, 2d edition (1878), p. 120; Principles and Practice of Obstetrics, by Bedford, 4th edition (1874), p. 264.

But we are here met with the argument that as the child may breathe before its head emerges from the pelvis of the mother, and as there is no birth until complete expulsion from the body of the mother, the breathing or respiration test stops short of proof of an independent existence. Scientific researches have pointed out the means by which it can be determined whether the child breathed before or after emerging from its mother. Should an effort to respire take place while the head is still within the pelvis, mucus and not air would be drawn into and fill the air cells; and upon a *post mortem* examination the lungs would disclose the exact nature of such a case. The mucus in the lungs would necessarily be discovered. If, however, a skilled accoucheur, in a case of difficult and continued labor, were to insert his hand for the purpose of rendering assistance to the child thus endangered by protracted labor, and the child were to respire by means of the aid thus rendered, the *post mortem* examination would not yield any evidence, under these circumstances, as to whether there was respiration before or after birth. But as the mother can never perform this operation upon herself, this obstacle in the way of the test, above stated, will not present itself in a case of infanticide. But notwithstanding all this, it is necessary that the child should have been completely expelled from the body of the mother, and alive; the proof must show this fact.

The respiration test can never determine whether the child breathed after the expulsion of the head, or full and complete birth, for we have found the test to be the condition of the lungs; that is, if they show atmospheric air and not mucus, we are to conclude that the breathing occurred either after *complete* birth, after the *head* was expelled, or under the circumstances above stated, when relief is extended by the accoucheur. Here then we are brought by the logic of these facts to a gap,—a hiatus in the proof,—which cannot be bridged over by physiological research. Let us restate:—"The child must be expelled completely from the mother, alive, before being the subject of homicide. This being a case of circumstantial evidence, resort is had to the condition of the lungs. They show evidence of having breathed atmospheric air. This may have been done while passing from the pelvis, after the expulsion of the head and before *complete* birth, and it being *necessary* for the proof to *meet* that *fact*, hence, under the facts of this case, arises this insurmountable difficulty." Greenleaf on Evidence, vol. 3, § 136; *State* v. *Winthrop*, 23 Iowa, 519; *Regina* v. *Trillor*, 1 Carrington & Marshman, 650.

Mr. Justice Parke seems to hold in *Rex* v. *Enoch*, 5 Car. & Payne, 539, that there may be breathing and yet no *independent circulation.* This we cannot concede. But it is believed that the idea sought to be conveyed by the learned judge is that, as there may be breathing before actual birth, the circulation of the child, though not through the umbilical cord, would not be independent; because of the child's not being completely expelled from the body of the mother. For we hold that, though the condition of the lungs can never determine whether the child breathed before or after full and complete birth, yet, independent circulation in its proper sense follows breathing. See authorities above cited upon this subject. The umbilical cord need not be severed in order to establish a circulation independent of the placenta. On the other hand cases have been cited in which a child has been wholly severed from the mother, and respiration has not *apparently* been established until after the lapse of several minutes of time; and the learned judge in the case of *State* v. *Winthrop* concludes that during that time there must have been an independent circulation. This would have been physically impossible,— in direct conflict with the physiological organization of the child. Nor, if true, would it follow that circulation did not invariably and instantly follow breathing.

We are of the opinion that independent circulation is proved by breathing; but, be this as it may, it being absolutely necessary to prove that the child was completely expelled from its mother, and that, after being thus born, it had an independent existence,— that is, that the child breathed, and its blood circulated independent of its mother,— before it can be the subject of homicide; and as the breathing test cannot determine whether the breathing occurred after complete birth, or after the head was expelled and before full and complete birth, a determination of the truth or falsity of the above apparently conflicting positions is unnecessary; the respiratory test being unable to reach and grapple the question, to wit, was the breathing after full birth, as above defined, or after the expulsion of the head and before complete birth? And as the facts in this case render it quite possible for the string to have been placed around the neck of the child after the appearance of the head and before full and complete birth, it becomes imperatively necessary for the attention of the jury to be plainly and directly called to the case as made by the evidence upon this fact and the physiological facts. Was this done by the court below? We think so.

Upon this subject the learned judge charged the jury that "Homicide is defined as the destruction of the life of one human being by the act, agency or procurement, or culpable omission of another. The person upon whom the homicide is alleged to have been committed must be in existence by actual and complete birth." And also: "In order that a child be in existence by actual birth, the parturition must be complete, and the body of the child must be expelled from the mother, and it must be alive, having an independent existence; so that the destruction of vitality in a child, before it is completely born, or the doing of any act before it is completely born, which causes death after the birth, is not a homicide, however culpable, or under whatever circumstances, or with whatever intent done.

"But if a child be wholly born alive, however frail it may be, and however near extinction from any cause, and another person inflict upon it any violence intentionally, by means or in a manner ordinarily calculated to cause death, which cause contributes to or hastens its death, such person is guilty of homicide.

"If you believe from the evidence before you, beyond a reasonable doubt, that the defendant, Sallie Wallace, did give birth to a female child, at or about the time alleged in the indictment, and in the county alleged; that said child, if any, was born alive and in existence by actual and complete birth, as the same has been explained; and that at or about the time alleged, and in the county alleged, and after said birth, if any, and before the indictment was presented, the defendant, Sallie Wallace, did violently and intentionally, and by the means and in the manner alleged kill said child," etc.

Also: "If you believe from the evidence that defendant did give birth to a child as alleged, and that said child did possess vitality before it was born, and that before it was completely born she destroyed the vitality of the child, or before it was born inflicted violence upon it of which it afterwards died, you will acquit the defendant, whatever may have been her intention, as in such case the destruction of life would not be a homicide; and if you believe there was a child so born, and that its vitality, if any, was destroyed by violence inflicted by defendant, but in view of all the evidence you have a reasonable doubt as to whether the violence was inflicted before complete birth, or before actual existence after birth, or have a reasonable doubt as to whether such violence, if any, was inflicted with the malicious purpose to destroy the life, if any, you will find the defendant not guilty."

By this charge the jury were told, in a plain and excellent manner, that there must be a complete birth,—independent existence,—to constitute a subject for homicide. It is true that the judge did not tell the jury that, to establish this independent existence, there must be evidence of breathing and an independent circulation. These were matters of evidence. These facts constituted the evidence of the independent existence, and we will presume that the jury were possessed of a sufficient amount of common sense to deal with and solve the issue. To us it appears that the principles contended for by counsel for defendant were fully recognized by the judge, and correctly applied in his charge.

Let us, however, return to the logical conclusion forced upon us by the facts and principles of this case, which are formulated in the question: Is the verdict of the jury supported by the evidence? Do the facts, viewed under the light of the above principles, show that the life of the child was destroyed after complete birth? Where, in the whole range of facts, is it not shown that the violence used was not inflicted after the head of the child was expelled and before a complete birth,—before an independent existence was established? What evidence fills the vacuum? Must the reasonably possible fact be ignored, that all shown to have been done by defendant may have occurred after the head had been expelled and before actual birth,—before an independent existence?

The *post mortem* examination made by the physician fails to reach and solve this question. The law requiring that the person charged to have been killed must be in existence,—living, with an independent circulation,—with all of the vital organs in operation separate and independent of his mother, before he can be the subject of homicide, the proof must clearly and satisfactorily show a person with just such an existence, before a party can be found guilty of culpable homicide. Nor is this court to take into consideration questions of good or bad policy. We are to pass upon acts made penal by the law of the land, and it is our duty to see that every constituent element and necessary ingredient of the offense be reasonably and satisfactorily proved. In this case we are of the opinion that the evidence fails to establish the independent existence of the child at the time the violence was inflicted, if any. 3 Greenleaf's Evidence, § 136. We are not to be understood as holding that there may not be cases in which the evidence or proof resulting from a *post mortem* examination, though imperfect within itself, may not be so supported by the surrounding facts as to justify a conviction in purely circumstantial cases. The investigation may leave it in doubt whether the violence was inflicted before complete birth; but, taking the fact that the child respired, though uncertain when, in connection with the character and extent of the violence inflicted, a case may be clearly and conclusively proved.

The record fails to show that the child was a female, and failing to support the verdict on the main point, the judgment must be reversed and the case remanded.

Reversed and remanded.

COURT OF APPEALS OF TEXAS.

AUSTIN TERM, 1881.

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A. P. MATHEWS *v.* THE STATE.

1. ROBBERY — EVIDENCE.— Proof that the money of which the party injured was deprived was forty dollars and of the value of forty dollars, will not sustain a conviction under an indictment which described the money as "forty dollars in current paper money of the United States, to wit: two ten dollar bills of the value of ten dollars each, and four five dollar bills of the value of five dollars each."
2. VERDICT.— EVIDENCE that the property appropriated was of the value of fifteen dollars will not support a verdict finding the defendant guilty of swindling to an amount exceeding twenty-five dollars, and therefore of felony.
3. PRACTICE.— The Code of Criminal Procedure provides that where a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment or information.
4. THEFT is among the offenses consisting of different degrees, and includes swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code.
5. PROOF.— In all cases where the verdict is for a minor degree of the offense charged in the indictment, the proof should meet the statutory definition of the minor degree.
6. SWINDLING is defined to be the acquisition of personal or movable property, money, or an instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same.
7. SAME.— But in order to constitute the offense some false representation as to existing facts or past events must have been made. Mere

false promises or false professions of intention, although acted upon, are not sufficient.

8. **EVIDENCE.—See evidence *held* insufficient to support a verdict for swindling, and *held* also not to warrant a charge of the court on that offense.**
9. **INDICTMENT—DUPLICITY.—See the opinion for an indictment of two counts, *held* to charge offenses of a character so similar as not to be subject to the objection of duplicity.**

APPEAL from the District Court of Tarrant. Tried below before the Hon. A. J. HOOD.

The indictment in one count charged the robbery, and in another the theft of a watch of the value of $15, and of $40 in money. The conviction was for swindling to amount exceeding $25, and a four years' term in the penitentiary was the punishment assessed.

The only witness in the case was R. W. Cashion, the party alleged to have been despoiled. He testified that he and his family arrived in Fort Worth from Lincoln county, Tennessee, on the —— day of ——. The next morning he started out in town in search of Mr. ——. He was an entire stranger in the country, and inquired of a man whom he has since known as "Castor Oil Bill" for the party of whom he was in search. "Castor Oil Bill" asked the witness several questions, and among other things the witness told him that he was just from Tennessee, and was a stranger in the city. "Castor Oil Bill" remarked that he was going the direction witness desired to go, and would show or tell him where he could find the party he was looking for, but first to step into a saloon near which they were and take a drink. After some persuasion the witness went in, the two took a drink, and then started to where the party could be found that witness was looking for. "Castor Oil Bill" took the witness up a street and around a corner or two, the names of which streets the witness did not know. *En route*

Bill said to witness that he had to stop a minute at the "Land Office," and then they would proceed. After walking some distance Bill stopped in front of a back stairway which led up to the door of a large up-story room, which he told witness was the "Land Office," and asked him to walk up with him a minute, which the witness did, believing it to be the Land Office. When they entered the witness saw A. P. Mathews and another man sitting at a table, playing cards, to whom Bill spoke in a friendly and intimate manner. Very soon Bill proposed that all the parties present play a game for drinks. The witness told them that he could not play cards, had never played them in his life, and knew nothing about playing. They all insisted, and Bill said that if he, Bill, and the witness lost, that he would pay for the drinks, and witness should lose nothing. The witness tried to be excused, but they insisted. About this time the witness went to the door through which he had entered, and tried to get out, but found it locked. The three men still insisted on his playing, and finally, not knowing what to do, and finding himself locked in the room with three men he did not know, in a city where he was an entire and total stranger, he sat down and they commenced playing, the witness scarce knowing one card from another. After the cards had been dealt around a few times, one of the men said he "had a d—d good poker hand," and the others said they had pretty good poker hands, and asked the witness what kind of a poker hand he had. The witness truthfully responded that he did not know. The three men commenced to bet or appeared to bet on their hands as poker hands, when Castor Oil Bill came around, looked at the witness' hand, and said: "Why d—n it, your hand is the best of any, and is bound to win if you will bet." The witness responded that he had never bet a cent in his life on cards, and could not. They insisted; the witness refused. They told witness "d—n it, you shall bet." The witness told them he had nothing to bet. They said you have a watch, and one of them pulled the watch, a silver one, worth about fifteen dollars, from witness' pocket, and put it on the table, telling witness he must bet as he had the best hand. The others then put down more money and told the witness he must put down money too. The witness told them he had none to bet — that he had but forty dollars in the world, a wife and small children, and was in a strange town. They insisted, and the witness, not knowing what to do, pulled out the money and Castor Oil Bill put it on the table, all saying the witness was bound to win. They decided that the witness had lost, and the witness begged them not to take what he had, but they said that the witness had bet and lost, and that the watch and money belonged to the defendant, A. P. Mathews, whereupon Mathews gathered up the money and watch, and placed all in his pocket. After a great deal of persuasion Mathews, the defendant, returned the witness five dollars, and they opened the door and let the witness out. This occurred in Fort Worth, Tarrant county, Texas.

B. G. Johnson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The indictment upon which the appellant was tried and convicted contains two counts. The first count charges: "That one A. P. Mathews, in the county of Tarrant and State aforesaid, on the 13th day of December, in the year of our Lord one thousand eight hundred and eighty, with force and arms did make an assault upon one R. W. Cashion, and did then and there unlawfully, by means of said assault, and by violence, and by putting said R. W. Cashion in fear of life and of great bodily injury, take from the possession of said Cashion a certain watch and chain then and there belonging to said Cashion, of the value of fifteen dollars, and forty dollars in current paper money of the United States, then and there belonging to said Cashion, and described as follows, to wit: Two ten dollar bills of the value of ten dollars each, and four five dollar bills of the value of five dollars each, which money the grand jurors are unable more fully to describe, with intent then and there on the part of him the said Mathews to appropriate to his, said Mathews', use." The second count charges the defendant with the theft of the same property and money set out in the first count, and it is described in the second count just as it is in the first.

On the trial below the jury returned the following verdict: "We the jury find the defendant guilty of swindling to an amount exceeding twenty-five dollars, and assess his punishment at confinement in the State penitentiary for a period of four years." Judgment was rendered in conformity to the verdict. The defendant's motion for a new trial was overruled, and this appeal is prosecuted. The first error assigned raises the question whether the testimony sustains the descriptive averment in the indictment as to the money charged to have been taken by the defendant. It does not appear that any attempt was made on the trial to identify the money taken with that described in the indictment, or that the attention of the solitary witness who testified in the case was called to the money described in the indictment. He seems to speak, as one of the incidents of the transaction, of having but forty dollars, and of pulling it out, and of his companion having bet it, and that it was decided he had lost and the defendant had won, and says it was of the value of forty dollars, that the defendant on persuasion gave him back five dollars, and that the money the defendant kept was of the value of thirty-five dollars; but we fail to see any attempt whatever to identify the money by proof with that described in the indictment, further than inferentially that it belonged to the witness. Because of this defect in the proof the money alleged to have been taken cannot enter into or form any part of the basis of the verdict and judgment. No question is raised as to the proof of identity of the watch, but its value being shown to be but fifteen dollars, will not support the verdict; and on this account we are of opinion a new trial should have been granted.

The second error assigned raises a question of the sufficiency of the testimony to support a verdict of guilty of swindling. It is true that, agreeably to the Code of Procedure, it is declared that when a prosecution is for an offense consisting of different degrees the jury may find the defendant not guilty of the higher degree *(naming it)*, but guilty of any degree inferior to that charged in the indictment or information. Code Crim. Proc. art. 713. And among the enumerated offenses which include different degrees we find the following: "Theft, which includes swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code." Code Crim. Proc. art. 714, subdivision 6. From this provision it would seem that agreeably to the intention of the law-makers swindling is an inferior degree of the crime of theft, and that an indictment for theft would support a conviction for swindling. In all cases, however, the proof must sustain the verdict or it ought not to stand. In all cases where the verdict is for a minor degree of a major offense charged in the indictment, the proof should meet the definition of the minor degree when it is specifically defined by law.

For example, an indictment for murder would support a conviction for manslaughter, on proof of manslaughter, and so an indictment for maiming would support a conviction for an assault and battery, on proper proof of that degree of the offense, which is included in the charge of maiming. In all these cases the question is, do the proofs show the commission of the degree of the offense of which the party has been found guilty by the jury? And in the present case the question presented for our determination is, do the proofs sustain the verdict of guilty of swindling, as that specific offense is defined by the Penal Code? This particular offense is well defined in the Penal Code, art. 790, and its punishment is prescribed in art. 796. The punishment was changed by the Revised Code from what it was formerly. (See the former law, Pasch. Dig. art. 2432.) The definition of the offense, however, has undergone no change by the revision; so that former adjudications apply to the law as it now is. By the statute swindling is defined to be the acquisition of personal or movable property, money, or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same. Penal Code, art. 790. This article was construed in *Johnson* v. *State*, 41 Texas, 65, to require that some false representations as to existing facts or past events should be made, and that mere false promises or false professions of intention, although acted upon, are not sufficient to constitute the offense.

The difficulty in the way of the present conviction is that the testimony does not show that the defendant obtained the money or property of the prosecuting witness by means of any false or deceitful pretense or device, or fraudulent representation, which is requisite to constitute the offense of swindling. To our minds the evidence more nearly approaches robbery or theft than swindling. The testimony does not support the verdict, nor in our opinion did it warrant the charge of the court on swindling.

It is urged in argument for the appellant that the indictment is vicious, because it charges robbery in one count and theft in another, and that the prosecution was not required to elect as to which count the State would try upon. The character of offenses charged in the two counts is so similar that the objection for duplicity is not well taken, but aside from this we are of opinion that the record discloses a virtual election to try on the count for theft, and that the defendant had the benefit of an election, and hence has no ground to complain of the indictment. The indictment may comprise as many counts as are necessary to meet the contingencies of the evidence, without necessitating an election. *Dill* v. *State*, 1 Texas Ct. App. 278; *Weathersby* v. *State*, id. 643; *Dalton* v. *State*, 4 Texas Ct. App. 333; *Irving* v. *State*, 8 Texas Ct. App. 46.

Because the testimony does not sustain the descriptive averment in the indictment as to the money charged to have been taken, and because the value of the other property taken is not sufficient to support a verdict of felony, and because the testimony did not warrant either the charge of the court on the subject of swindling or the verdict finding the defendant guilty of swindling, the judgment will be reversed and the case remanded.

Reversed and remanded.

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DANIEL KIEF, SR., *v.* THE STATE.

ASSAULT.— Under article 489 of the Revised Penal Code an assault may be committed by "the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object." *Held*, that the ability to commit a battery need not be shown in order to constitute or prove such an assault. (*McKay* v. *State*, 44 Texas, 43, and *Jarnigan* v. *State*, 6 Texas Ct. App. 465, were cases decided before the enactment of the Revised Codes.)

APPEAL from the County Court of Dallas. Tried below before the Hon. R. E. BURKE, County Judge.

Appellant was prosecuted by information for an aggravated assault on his daughter, on the 15th day of August, 1880. The jury found him guilty, and assessed his punishment at a fine of $130.

The evidence shows that the appellant, under the influence of ardent spirits, flew into a furious passion at his daughter, and with an open razor in his hand, and using violent threats, approached and terrified her, but that she made her escape before he got nearer to her than twelve or fourteen feet. The defense maintained that at such a distance he had no ability to commit a battery on her with a razor, and that therefore his conduct did not constitute an assault.

Stemmons & Field, for the appellant.

H. Chilton, Assistant Attorney General, and *H. M. Holmes*, for the State.

HURT, J. The appellant was convicted of an aggravated assault, and from the judgment thereon he appeals to this court. The record as well as the brief and argument of counsel for appellant present but one question for our decision, which is, must the assailant under all circumstances and in every case have in fact the ability to commit the battery? (We are not considering the question of burden of proof.)

The Penal Code, as explained in *McKay* v. *State*, 44 Texas, 43, made it absolutely necessary to the commission of an assault that the party have the ability to inflict the violence and battery. And as great indignities and injuries can be inflicted upon the mind and feelings of individuals without the ability in fact to inflict or commit a battery, our Code, since the decision was made in the

McKay case, has provided "that the use of any *dangerous weapon*, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, under circumstances calculated to effect that object, comes within the meaning of an assault. Under this provision the ability to commit a battery which was before absolutely necessary under the McKay case, is now under a proper state of facts unnecessary. The assault is complete if the party uses a dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object. With the policy of the law this court has nothing whatever to do.

We are therefore of the opinion that under this provision of the Penal Code the evidence supports the verdict of the jury. The judgment is therefore affirmed.

Affirmed.

J. H. RICE *v.* THE STATE.

CARRYING WEAPONS.—To a prosecution for unlawfully carrying a pistol about his person, the defendant set up the defense that he was a traveler, and as such was expressly exempt from the penalties denounced against persons carrying prohibited weapons. The evidence showed that the defendant, when arrested in C. county, was *en route* with a herd of cattle from another county to a market in Kansas, and progressed about ten miles per day. *Held*, that he was a traveler within the spirit and meaning of article 319, Penal Code.

APPEAL from the County Court of Clay. Tried below before the Hon. W. B. PLEMONS, County Judge.

The opinion discloses the case.

R. M. Donley, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was prosecuted in the County Court, charged with carrying about his saddle a pistol. The prosecution was had in Clay county. Agreeably to the testimony as set out in the statement of facts, the defendant, at the time of his arrest, was traveling with a herd of beef cattle, to market, from Throckmorton county, Texas, to Honeywell, Kansas, and was encamped for the night in Clay county. He kept his pistol in his baggage wagon at night, and carried it suspended to the horn of his saddle during the day, and traveled at the rate of nine or ten miles per day. It was proved that Throckmorton county is about one hundred and sixty miles southwest, and Honeywell, Kansas, about two hundred and seventy-five miles north of Clay county, Texas.

It is assigned as error that, agreeably to this testimony, the defendant at the time he carried the pistol was a traveler. It is specially provided that the provisions of the Penal Code which prohibit the carrying of certain arms shall not apply to persons traveling. Penal Code, art. 319. We are of opinion that agreeably to the testimony the defendant at the time of his arrest was a traveler within the spirit and meaning of the exception made in favor of travelers by the Code, and therefore that the evidence does not support the finding and judgment. On this account the judgment will be reversed and the cause remanded.

Reversed and remanded.

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G. B. PICKETT v. THE STATE.

1. **UNLAWFULLY CARRYING ARMS.**—An indictment which purported to charge the appellant with carrying a pistol into a public assembly was quashed for that offense, but was sustained for the simple carrying of a pistol. *Held*, that, as the indictment contains all necessary allegations to charge the latter offense, there was no error to appellant's prejudice in the ruling of the trial court.
2. **SAME.**—INDICTMENT for carrying a pistol need not allege that it was "unlawfully" carried. The phraseology of the statute suffices.

APPEAL from the County Court of Wise. Tried below before the Hon. S. H. HODGES, County Judge.

Two witnesses for the State testified that, on the day alleged in the indictment, they saw the handle and a part of the cylinder of a pistol protruding from the appellant's hip pocket.

For the defense, a gunsmith testified that the appellant, on or about the same day, brought him the handle and cylinder of a pistol, to get them repaired. Two other witnesses stated that, on or about the day in question, they observed the handle of a pistol on the person of the appellant and cautioned him about it; whereupon he exhibited the article, which was only the handle and cylinder of a pistol, without a barrel.

The jury, however, found the appellant guilty of carrying a pistol, and assessed a fine of $25 against him. The court below refused him a new trial.

Sparkman & Carswell, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was prosecuted, convicted and fined twenty-five dollars under an indictment the charging part of which reads as follows: "Did go into a public assembly, to wit, a public convention where persons were then and there assembled, and did then and there have and carry about his person a pistol." The defendant moved the court to quash, which motion was sustained as to the public place or assembly, but overruled otherwise, and the indictment was held good for simply carrying a pistol, under article 318, Penal Code.

The defendant excepted, and assigns for error the action of the court in overruling his motion to quash. There was no error against defendant in this ruling. Strike from the indictment all that is said in regard to the public place or assembly, there still remains every element of the offense for which defendant was convicted, clearly charged in the indictment. The other may be treated as surplusage.

It is objected "that the indictment is defective because it does not allege that the pistol was unlawfully carried." This is not necessary. The language of the statute is used, and this is not of that class of cases in which it is required to go beyond the terms of the law creating the offense. The case of *Massey* v. *State*, 4 Texas Ct. App. 580, does not support this assignment. We are of the opinion that the certificate of transfer to the County Court is sufficient.

The insufficiency of the evidence is urged for a reversal of the judgment. The jury passed upon this question; nor are we prepared to reverse their decision. As is frequently the case there were two theories; that of the State was found true by the jury, who heard the witnesses and saw their manner of testifying. The presiding judge was in a better position than we to pass upon this matter.

Finding no error which would warrant a reversal of the judgment, it is therefore affirmed.

Affirmed.

J. H. CREWS *v.* THE STATE.

RETAILING.—INDICTMENT OR INFORMATION for pursuing a taxable occupation without license should allege the amount of the taxes due and unpaid, and, if any part thereof be county tax, it should further allege the levy made by the county commissioners; and it is incumbent on the State to prove this allegation.

APPEAL from the County Court of Fannin. Tried below before the Hon. T. B. COX, County Judge.

The case is disclosed in the opinion.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant, Crews, was prosecuted to conviction for pursuing the occupation of selling intoxicating liquors in quantities less than one quart, without obtaining a license therefor. Art. 110 of the Penal Code provides: "Any person who shall pursue any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less *than the amount* of the *taxes so due*, and not more than double that sum." By article 4665 of the Revised Statutes the amount for pursuing the occupation of selling intoxicating liquors in quantities less than one quart is fixed at two hundred and fifty dollars. This is the State tax. Articles 4666 and 4668 authorize the commissioners of the several counties to levy taxes equal to one-half of the State tax. The commissioners cannot go beyond one-half, and are not *compelled* to levy any tax upon those occupations.

Whilst the information charges that the amount due and unpaid is two hundred and eighty dollars, it fails to inform us whether these are State or county taxes. This is fatal; for, if county taxes, the indictment or information must charge the levy by the commissioners. The levy and the amount levied must not only be charged, but the State must prove these allegations. *Spears* v. *State*, 8 Texas Ct. App. 467; *State* v. *McCormick*, 22 Texas, 297; *Osborn* v. *State*, 33 Texas, 545; *Thorp* v. *State*, 28 Texas, 696. The appellant moved to quash, and also in arrest of judgment. These motions were overruled by the court and exceptions taken. This was error for which the judgment is reversed and the cause remanded.

Reversed and remanded.

HENRY WARD v. THE STATE.

1. **CHARGE OF THE COURT — CIRCUMSTANTIAL EVIDENCE.— Where the guilt of the accused is dependent solely upon circumstantial evidence, it is the duty of the court to apply, in its charge, the law applicable to such evidence, whether so requested or not.**
2. **PRESUMPTION OF LAW — EVIDENCE.— Though the conclusion of guilt is presumed from the facts found, these facts must be strictly proved by the testimony of witnesses under whose observation they have actually and directly fallen, or the presumption of guilt must be made from facts which have been established by inference from the elementary facts of the case. The guilt of the accused should flow easily and naturally from the facts proved, and be consistent with all the facts.**
3. **EVIDENCE *held* insufficient to sustain a conviction for theft.**

APPEAL from the District Court of Ellis. Tried below before the Hon. G. N. ALDREDGE.

The bill of indictment charged that the appellant and John Turner, on the 15th day of November, 1878, in the county of Ellis, did take, steal and carry away, from and out of the possession of M. N. Frank, sundry dry goods of the aggregate value of $250. A verdict of guilty assessed the punishment at two years' confinement in the State penitentiary.

Introduced by the State, L. Butler testified that himself and Allen Butler visited Larkins Butler, who was living on the Turner farm, adjoining the home of witness, on the evening before the offense was said to have been committed. About sundown the appellant and John Lawhorn, riding a mule, and John Turner, riding a horse, rode up from the direction of old man Ward's. After supper, it being a little after dark, the appellant riding a mule and Turner a horse left, saying they were going to Milford. About an hour and one-half before day, John Turner, cold, wet and drunk, came into the room in which the witness, Allen and Larkins Butler, and John Lawhorn were sleeping. He did not go to sleep. About daylight the witness went down to the horse-lot to feed, and saw the appellant standing near the barn, behind which a gray horse which belonged to old man Ward was tied. Between day and sunrise, while the witness was standing near the lot fence, he saw, about forty yards off, in the orchard, a gray blanket spread out on the ground, and went to it. It was muddy and wet, but appeared to be new. This blanket the witness gave to Larkins Butler. About sun-up appellant and Turner left together, walking off in the direction of old man Ward's. In an hour and a half they returned, went up to a loft, and then towards home. Witness found fresh mule and horse tracks leading up to the blanket from across the creek, up through the field west of the house.

Allen Butler, for the State, testified substantially as the witness L. Butler.

Ed. Chaskie, for the State, testified that he was merchandising in Milford at the time of the alleged theft. On that night John Turner was in his store and wanted to buy an overcoat and boots on credit. Witness refused to sell, and Turner said he had a friend outside from whom he would see if he could borrow the money. The witness immediately closed his store, locking his doors.

J. J. Jennings testified, for the State, that he and Rothschilds were keeping the goods for Franks, who was in Corsicana. He went home a little before dark on the evening of the night on which the store was robbed. The blanket claimed to have been found by the witness Butler was similar to, and, in the opinion of the witness, was one of a lot missed from the store. The witness had had sold similar blankets a short time before. This blanket he received from Larkins Butler after the theft. The other goods missed, consisting of such as are described in the indictment, overcoats, shoes, blankets, etc., were afterwards recovered. Franks lived in Corsicana, and had not been in Milford for six weeks previous to the robbery. The witness did not know his present whereabouts,— had not seen him for two years.

For the defendant, Warren Ward, a brother, testified that about sundown on the evening of the alleged robbery, he saw the appellant, John Lawhorn and John Turner at his (witness' and appellant's) father's house. The two last named parties had been running cattle out of Mrs. Turner's field. The appellant got up behind Lawhorn on a mule, and they started towards Mrs. Turner's. John Turner and appellant returned to witness' father's house, where both were staying, about 10 o'clock. The appellant had been drinking. He lay down on a pallet with the witness, and lay there until about day, when he got up and said that he must return Lawhorn's saddle and get some whiskey from Turner. He left and returned about sunrise with Turner. They took breakfast and left again. When the appellant came in that night of the alleged robbery, he left Turner in the barn. The appellant had none of the goods mentioned in the indictment when at his father's. Thomas Ward testified substantially to the same effect.

A. Zollicoffer testified that, on the night of the alleged robbery, he met the appellant and John Turner, about 9 o'clock, traveling from towards Milford, the appellant riding his father's gray mare. Neither had with them any of the goods described in the indictment.

Monroe Dean, a cousin of the appellant, testified for the defense that he was subpœnaed on behalf of the State about the second day after the alleged robbery. In going to Mr. Ward's, the witness saw Larkins Butler walking along a dry branch near the road. He asked him where he was going, and Butler said "to Mr. White's." After passing him, the witness looked back and saw him leave the road to White's and follow a path through a thicket of timber. Thinking strange of this, the witness returned in a few hours, followed the same path and Butler's foot tracks, through the thicket into the bed of the branch, and on a bluff found some goods. He informed Jennings, who got and recognized them as some of the stolen goods.

John Sproulls testified, for the defense, that at the time spoken of by the witness L. Butler a blanket spread on the ground in the orchard could not be seen from the lot from where Butler said he saw it, because of intervening corn-stalks and weeds.

Joel Turner, brother of John Turner, testified that the field west of the house, spoken of by the witness L. Butler, had no opening in the direction spoken of, until the fence reached the creek near the horse lot, where there was a gate, and was not in the direction of Milford. Witness admitted that he was under indictment found in 1877, in Ellis county, for assault to murder. He left Ellis and was arrested in Noland county, in 1877.

The State recalled L. Butler, who, explaining the testimony of Dean, stated the locality of the goods found by Dean to be in the direction taken by appellant and Turner, when they left the house on the morning after the robbery as stated by him in his evidence in chief. The State also proved that Larkins Butler, the person spoken of by the witness, had been in attendance upon every term of court until about six weeks before this trial, when he returned with his family to the State of Mississippi, whence they came.

E. P. Anderson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was tried and convicted of theft of goods from the store of M. N. Frank. There are two errors assigned by appellant, upon which the judgment is asked to be reversed: 1st, that the court below failed to charge upon circumstantial evidence; and 2d, that the evidence fails to support the verdict.

The assignments, we think, are well made. This is a case of purely circumstantial evidence, and it was the duty of the court below, whether asked or not, to give in charge the law applicable to such a case. See *Myers* v. *State*, 6 Texas Ct. App. 1; *Burrell* v. *State*, 18 Texas, 713; *Cave* v. *State*, 41 Texas, 182; *Hunt* v. *State*, 7 Texas Ct. App. 212; *Smith* v. *State*, id. 382; *Struckman* v. *State*, id. 581.

The second ground for which the judgment is sought to be reversed is that the evidence fails to support the verdict of the jury. After a very careful examination of the statement of facts, we must conclude that if there is a fact proved, not presumed, which reasonably tends or leads to the guilt of the appellant, we have not been able to discover it. The rule dictated by justice and reason requires that the evidentiary facts be proved and not presumed. The conclusion of guilt is presumed from the facts found, but these facts must be *proved*, in the strictest sense; that is, they must be shown to be true by the testimony of witnesses under whose observation they have actually and directly fallen, or the presumption of guilt must be made from leading facts which have been established by inference from the elementary facts of the case. Burrill on Cir. Ev. 136–8.

Another rule which is approved by all thinking and just men requires that guilt should flow naturally and easily from the facts proved, and be consistent with all of the facts. § 812, rule 4, 1 Stark. Ev. 561–573.

Apply these plain and just principles to the facts in this case, and we think it will be found that there is no fact proved, either by direct or presumptive evidence, tending or leading to the guilt of the appellant,— such presumptive evidence as is required by the rule. See this question illustrated by Burrill, p. 137. In order to convict the appellant, the facts must have been presumed in this case from other doubtful conclusions not authorized by the proved facts of the case. As the judgment will have to be reversed and the case tried again, we will not comment on the evidence.

For the errors above noticed, the judgment must be reversed and the cause remanded.

Reversed and remanded.

BOB HOWELL *v.* THE STATE.

1. **VERDICT — ARREST OF JUDGMENT.**— "We the jury find the defendant guilty of a misdemeanor, and assess his punishment at one hundred dollars," is a verdict entirely insufficient to support a judgment, and a motion in arrest based thereon should prevail.
2. **PRACTICE — NEW TRIAL.**— See the opinion *in extenso*, and general summary for condition of evidence that would warrant the granting of a new trial in order to give the defendant the benefit of the testimony of a co-defendant acquitted subsequently to defendant's conviction.

APPEAL from the District Court of Parker. Tried below before the Hon. A. J. HOOD.

The indictment was for theft of cattle belonging to J. W. Wylie, the defendant being charged in connection with William Howell. The conviction was for misdemeanor; the verdict rendered, upon which the principal question arises, being in words as set out in the opinion. William Howell was subsequently acquitted, and as the evidence in this case is of such character that it is held sufficient to warrant a new trial to afford the defendant an opportunity of producing the testimony of a co-defendant who was acquitted subsequent to his conviction, a brief summary is appended.

J. W. Wylie testified that, between the 1st and 10th of October, 1879, he was informed by Mr. Dillingham that the Howell boys had driven a bunch of cattle by his house, including a black heifer eighteen months old, the property of witness. The witness, missing the heifer, went in search of it, and on the second day found the herd on Pinnell prairie, and near it his heifer and two speckled cows that had run with it on the range. These three animals were feeding off from the herd, which numbered some two hundred head. The witness asked Wm. Howell if the herd was his, and, on being answered affirmatively, said nothing about the heifer to Howell, but rode back and lodged complaint against the Howell boys, for theft of the heifer, the cows and a red steer. On the next day witness visited the herd with a constable, who arrested Wm. Howell. The witness then told him that the black heifer was his, and Wm. Howell said that he did not claim it, that it had followed the herd, though himself and his brother Bob, this defendant, had attempted to keep it from following. He then ordered one of his hands to assist in "cutting" it out of the herd. Wm. Howell had no horse, but after much difficulty witness, the hand, and McFall, the constable, cut the heifer out of the herd, and witness drove it home without much trouble, a distance of some seven or eight miles. He had not given the Howells permission to drive off the yearling.

Robt. Dillingham testified that, about the 1st of October, 1879, himself and his son were standing in his house yard when the defendant and his brother William passed by driving several head of cattle, including the heifer belonging to the witness Wylie, and other cattle that witness recognized as the property of other neighbors, and two or three estrays. He notified the witness Wylie. This witness was corroborated by his son, who, however, did not distinguish the heifer in question among the cattle driven by the Howells past the house. McFall, the constable who accompanied Wylie to the herd and arrested Wm. Howell, gave about the same account as Wylie of what transpired at the herd,—adding that defendant was not there at the time, but afterwards came in and gave himself up.

Mose Bonner, for the defense, testified that he saw the Howells and one or two hands on the prairie, about the 1st of October, 1879, driving a small bunch of cattle. The black heifer was following the bunch, about fifty yards behind. He saw Wm. Howell turn back and drive the yearling several hundred yards southerly, in the direction of Dillingham's house, and then return to defendant and the bunch of cattle, traveling in a westerly direction.

Newton Butler testified that he rode up on the Howells in Pinnell prairie some time in September or October, 1879. They were driving a bunch of cattle. After riding some distance the witness noticed a black heifer coming up towards the herd from an east course. Wm. Howell remarked, "There comes that d—d yearling; it has followed us from Willow creek, and I have driven it back three or four times. If you will help, we will 'scoot' it back again." Witness assisted in driving it back near a half mile, and then left the parties.

James Savage testified, for the defense, that after the Howells had driven several head of cattle to their herd, he saw a black heifer come up and join the herd, and on request assisted in cutting it out, and in driving it off about a quarter of a mile. The Howells told witness that the heifer had followed them all the way from Willow creek.

Sam Shadle testified, for the defense, that a few days after he heard that the Howell boys had got into trouble about the heifer, he went to their herd to get some cattle he heard they had driven up for him, but found they had left the herd. This defendant went with witness to the range from which the cattle were driven by them, and found witness' cattle (the same previously driven by and which had escaped from the Howells) in company with a black heifer. They started with witness' cattle, and the heifer followed. The witness drove it back once or twice, and then got a bush and clubbed it back. This witness stated that yearlings were often exceedingly troublesome to separate from cattle with which they ran. He had, prior to this trouble, employed the Howells to drive up any of his cattle they might find for him, and this authority to them was general.

A new trial being refused, the defendant appeals.

Shannon & Moran, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. William Howell and Bob Howell, this appellant, were jointly indicted for the theft of a yearling. A severance was had at the trial, upon application of this appellant, and he was first placed upon trial and convicted. Subsequently William Howell was tried and acquitted.

After the return of the verdict in this case defendant made a motion in arrest of judgment upon the ground that the verdict was insufficient to support a judgment. The verdict was: "We the jury find the defendant guilty of a misdemeanor, and assess his punishment at one hundred dollars." Such a verdict was held clearly insufficient in *Senterfeit* v. *State*, 41 Texas, 188, where it was said "it does not sufficiently appear that the misdemeanor of which the jury find the defendant guilty is that charged in the indictment." Upon the authority of that case the court erred in overruling the motion to arrest the judgment.

This court is further of opinion that, in view of the meagreness of the inculpatory evidence adduced against the defendant, a new trial should have been awarded him in order that he might have had the benefit of the testimony on another trial of his co-defendant, William Howell, who had been tried for the same offense and had been acquitted subsequent to appellant's conviction.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

W. H. Peters and others *v.* The State.

1. **Bail.**—By the former Code of Criminal Procedure (Pasch. Dig. art. 2748), a sheriff was prohibited from taking bail in a felony case "during the term of the court," and was required to take the accused before the court, to enter into recognizance. *Held*, that this article applied only to cases pending in the District Court, and not to cases of which it had not by indictment or otherwise acquired jurisdiction or cognizance. The Revised Code of Procedure, in article 304, contains a more explicit provision to the same effect.
2. **Same.**—Being committed by a justice of the peace on a charge of bailable felony, the bail of the accused was fixed by the justice at $1,000, but subsequently the State's counsel and the accused agreed

that the sheriff should release the accused on a bond for $500; which being executed by the present appellants, the accused was released. In defense to *scire facias* on the forfeiture of the bond the appellants contend that it was void because taken by the sheriff in a sum different from that fixed by the justice. But *held* that appellants are estopped. Note the distinction between this case and those of *Barringer* v. *State,* 27 Texas, 553, and *Neblett* v. *State,* 6 Texas Ct. App. 316. Such agreements, however, are highly reprehensible on the part of officials representing the State, and especially so on the part of the officer having the custody of the accused.

APPEAL from the District Court of Dallas. Tried below before E. G. BOWER, Esq., Special Judge.

The case is sufficiently stated in the opinion.

D. A. Williams and *D. M. Payne,* for the appellants.

H. W. Holmes, for the State.

WHITE, P. J. From the evidence adduced on the trial it appears that on the 4th day of August, 1876, W. H. Peters was arrested by the sheriff of Dallas county by virtue of the warrant of a justice of the peace, issued on a complaint charging him with theft from a house, the property stolen being a watch. When brought before the magistrate, the accused waived an examination, and the justice ordered that he should give a bail bond for his appearance at the next term of the District Court, fixing the amount of the bond at the sum of one thousand dollars. On the 17th day of August thereafter, defendant, with the other appellants in this case as his sureties, executed a bail bond for his appearance to answer said charge at the next succeeding term of the District Court, to commence on the 2d Monday in December,—the penalty or sum named in the bond being five hundred dollars. This bond was taken and approved by the sheriff, and at the date of its execution and approval the District Court of Dallas county was holding a regular term and was then in session.

It is contended on this appeal from the final judgment rendered upon the forfeiture of said bail bond, that there are two patent errors for which the judgment should be reversed. 1st, because the defendant was charged with a felony, and, the District Court being in session at the time, the sheriff had no authority to take the bond; but that the accused should have been taken before the court that he might there enter into his recognizance. 2d. That if the sheriff had authority under the circumstances to take the bail bond, then he could only take it in such sum as had been fixed and prescribed by the justice, and that any bond taken and approved by him in another and different sum was an absolute nullity.

Theft from a house, at the time the bond was executed, though we have no such specific offense now, was a statutory felony, and so was and still is the theft of property over the value of twenty dollars. In support of the first error, article 2748, Pasch. Dig., which was the law then in force, is relied upon. It provides that "in cases of felony the sheriff cannot during the term of the court take the bail, but must bring the accused before the court that he may there enter into recognizance; but if from any cause the term of the court should end before such recognizance can be or is entered into, then and in that event the sheriff may take bail in such amount as may have been fixed in the case by the court." This statute manifestly refers only to cases pending in the District Court, and not to cases over which that court has acquired no jurisdiction, and is not applicable to cases like the one under consideration, of which at the time that court had no cognizance whatever. This construction is fully sustained by the wording of the present statute found in our Revised Code of Procedure. "In cases of felony when the accused is in custody of the sheriff or other peace officer, *and the court before which the prosecution is pending* is in session in the county where the accused is in custody, such sheriff or peace officer is not authorized to take a bail bond of the accused, but must take the accused forthwith before such court, that he may enter into recognizance or be committed as the case may be." Code Crim. Proc. art. 304.

Here no indictment had been found, no *capias* or bench warrant had been issued; in fact no single step towards a prosecution of any kind had been taken in the District Court, and that court not only had no jurisdiction of the party or subject matter, but knew nothing of either. To our minds in such circumstances the law never could have contemplated that that court should be required to take the recognizance of a party in a matter of which it had no judicial or other legal cognizance. So far, then, as the facts were concerned, it made no difference if the District Court was in session; that did not deprive the sheriff of authority to take and approve the bond as though it were vacation, or as in ordinary cases. Pasch. Dig. art. 2761.

But it is said that in the event the sheriff had the authority, then he could only take bail in such amount as was fixed by the court. This amount, as we have seen, was fixed by the magistrate at the sum of $1,000. Upon this point we make the following quotation from the statement of facts in the record, viz.: "The parties then agreed that R. E. Cowart, who represented the State, and W. H. Peters and his attorneys agreed that M. M. Moon, sheriff of Dallas county, Texas, might take the bond in the penal sum of five hundred dollars, instead of the sum of one thousand dollars, the amount fixed by W. W. Peake, the committing justice of the peace." So it seems then that the change in the amount of the bond was not made by the sheriff of his own motion, but at the instance of and by special agreement between parties and their attorneys.

From the fact that the bond was reduced to one-half the sum fixed by the justice, we think it but reasonable to presume that it was at the solicitation and in the interest of the defendant and his sureties. At all events he obtained the benefit of it, his liberty; and his sureties by the agreement entered into relieved the State of her custody of the prisoner and assumed control of his person, themselves promising to become responsible for his forthcoming and appearance at the time stipulated. Can he or they be now allowed to take advantage of their own wrong, if wrong it be, and be heard to say that the bond is a nullity and they are absolved because the amount is less than the justice required?

We think not. By the voluntary agreement which they entered into with the legal representative of the State the obligors in the bond are estopped from denying the validity of their obligation solely upon the ground that it is less onerous in amount than that fixed by the justice; and especially is this so when we have every reason to believe that the obligation assumed by them was not only for the benefit but at the request of the accused. Their positive agreement deprives them of the right to complain. *Speak* v. *United States,* 9 Cranch, 28; *State* v. *Cannon,* 34 Iowa, 322.

As made by the facts the case here presented is entirely different from the cases of *Barringer* v. *State,* 27 Texas, 553, and *Neblett* v. *State,* 6 Texas Ct. App. 316, in both of which cases the sheriff of his own motion exacted and took bonds different in amounts from the sum prescribed by the justice, and not only different in amounts but also more onerous in terms.

But, whilst we hold that the sureties by virtue of the agreement alone, are not absolved from their liability, we cannot pass over in silence the assumed action or right and authority of the officers representing the State, and especially the sheriff having legal custody of the accused, to become a party to such an agreement for interfering with or changing the orders of the court in any particular with regard to the terms of a prisoner's custody. It is a dangerous assumption of authority, and one which subjects the officer himself to liability to punishment.

So far as appellants are concerned, however, we find no error in the proceedings and judgment, and the judgment is therefore affirmed.

Affirmed.

HURT, J., having been of counsel, did not sit in this case.

H. DONALDSON v. THE STATE.

1. ASSAULT AND BATTERY.— To constitute an assault and battery, the intent to injure must concur with the use of unlawful violence upon the person of the assaulted party; but the slightest degree of force suffices to constitute the violence, and the intended injury may be to the feelings or the mind of the latter as well as to the corporeal person. If such injury would be the natural consequence of the violence used, the unlawful intent is presumed unless the presumption is repelled by the evidence.
2. SAME — EVIDENCE.— If in a prosecution for assault and battery the intent imputed to the accused was to injure the mind or the feelings of the assaulted party, the evidence germane to the existence of the intent may well involve the character of the assaulted party, and the surrounding circumstances:— *e. g.*, if the battery consisted in manipulating a woman without her consent, and the intent imputed was to obtain sexual knowledge of her, proof of previous illicit intercourse between the parties, or evidence that she was a public prostitute, is legitimate for the defense as tending to disprove the imputed intent, and thus bearing directly on the issue.
3. SAME.— In the case above indicated the defense was entitled to require the woman herself, though married, to answer whether there had been acts of sexual intercourse between her and the defendant prior to the alleged assault.

APPEAL from the County Court of Lamar. Tried below before the Hon. W. S. MOORE, County Judge.

The conviction was for an assault and battery upon the person of one Bama Jeffries, a female, in Lamar county, Texas, on July 15, 1880. The fine imposed was $25.

The prosecutrix testified that she had no personal acquaintance with the defendant. On the day that the offense is alleged to have been committed the defendant drove up to her house in a buggy. The witness, at that time, was at the house of a neighbor, but under the impression that the defendant was her brother she returned to her house and met him, inviting him to take a seat. As she entered the room she remarked to him that her first impression was that he was her brother, and he responded by saying "I wish I was." Witness asked "why?" and defendant said, taking witness' hand, "perhaps I would have got a kiss." According to the testimony of this witness she protested against this familiarity, notwithstanding which, the defendant invited her to go to bed with him, and at one time, holding her hand, pressed her into a position behind a door and undertook to raise her clothes. She protested against these liberties, and while they were transpiring the defendant's horse took fright and ran away with the buggy. The defendant left the witness and followed and stopped the run-away horse and buggy. The defendant held the witness against her consent until the horse ran with buggy.

Cross-examined, the witness denied personal acquaintance with the defendant, but stated that on a previous occasion she was at his barber shop with another woman who was acquainted with him. The defendant on this occasion practiced deception in order to get the witness and the other woman in his shop, promising them a shampoo. He made an effort to get the two women in his back room on that occasion, but the witness, discovering that it was not a decent place, declined to go into the room, and herself and companion left. The witness denied that she had ever been in the defendant's bath room. The defendant had at no time sent for oranges and apples with which to treat witness, but, on the occasion of the visit to the shop spoken of, he sent for a cocoanut for the witness' companion. Generally, on going into town, witness would see defendant standing about his barber-shop door, and they ordinarily spoke. Witness did not tell her husband of defendant's conduct at her house, complained of in this prosecution, until the day after it transpired. Defendant was back of witness' house on the night of the day of his misconduct, and talked with witness and her husband. He pretended to have lost his buggy cushion. When defendant assaulted witness he offered her a dollar, which witness refused to take, but defendant forced it into her hand; and she refused to keep it and gave it back. Several white families and one negro woman, Ida Smith, lived near witness. She did not call for help, but ordered defendant to desist in a loud voice.. Witness went to the house of Ida Smith after the occurrence, but told her nothing about it. Witness thinks Ida could have heard her order the defendant to desist. The witness denied that she agreed to meet defendant at a peach tree that night for a certain calico dress. She denied that she told Grif Williams that she so agreed, or that she told Williams that she would have said nothing about the matter if Ida Smith had not first told it. She denied that she accepted a "treat" from defendant at a negro barbecue. Grif Williams called on witness and her husband and told them that defendant had admitted that he had done wrong, and would pay if the matter was dropped,—that he wanted it hushed up before his wife got back.

Charles Jeffries, husband of the prosecutrix, testified that he heard nothing of the defendant's conduct toward his wife until the evening after it occurred, when she told him. He did not know that the defendant had ever been to his house. Ida Smith had never mentioned the matter to him. Grif Williams had undertaken to compromise the matter on behalf of the defendant, and had said that the latter acknowledged his wrong-doing, but wanted to hush it up before his wife returned, and keep it out of court, and to this end would pay whatever witness demanded.

On cross-examination the witness denied that he had ever told Grif Williams that he was first informed of the assault by another woman. He did tell Williams that he would not go to see the defendant, and that defendant could do as he pleased about calling on witness.

Ida Smith testified, for the State, that she had never told Jeffries at any time about the defendant's assault upon his wife. Did not speak of it to any one until it was common talk. On cross-examination she said that she lived near Jeffries' house. The defendant was at that house in July, and had his horse and buggy hitched to the fence. The horse ran away, and defendant came out of the house and followed. Bama Jeffries, the prosecutrix, did not cry for help. The witness heard her making some noise, and thought she was laughing. The prosecutrix told witness nothing while defendant was at her house. After defendant left, the prosecutrix was at the witness' house in an apparent good humor.

Grif Williams, for the defense, testified that he saw the prosecutrix at her house after the difficulty, and she told him that she would have said nothing about it if Ida Smith had not first told *something*. She told witness that the defendant did not touch her more than to shake hands, but gave her a dollar, which she kept. She told witness that she did not know whether or not she promised to meet the defendant that night at the peach tree, but "expected she did." She was then in good humor. The husband of the prosecutrix told the witness that he first heard of the matter from Ida Smith. Before the difficulty the parties were at a colored barbecue near Paris, and witness saw defendant take the prosecutrix by an arm and escort her up to a stand and treat her.

Cross-examined, the witness said that he went to see Jeffries after the difficulty, to compromise a difficulty between him and defendant, and told Jeffries that defendant denied the conduct of which he was charged, but would pay if they would drop it, as he did not want to go into law about it. He did this at the defendant's instance, after the complaint in this case had been filed. The witness once saw the prosecutrix standing in defendant's shop door, and saw her and defendant go around towards the back of the shop, where there was a back door.

Homer, for the defense, testified that he worked in the defendant's barber-shop during the fall of 1879. Had often seen the prosecutrix come to the shop, and on one occasion saw her and the defendant go into the latter's bath room. Had seen her at the shop often before. He stated on cross-examination that the reason he thought the parties went into the bath room on the occasion spoken of was that the defendant asked witness for the key to the bath room, and the two went in that direction. He heard some one go into the bath room and lock the door, and some time after come out of the bath room and go off through the hall.

Clarence Higgins, who also worked for defendant, testified as positively as Homer to visits of the prosecutrix to the defendant's shop, and also that he had seen her go into the bath room with him.

Wooldridge & Phillips, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was tried and convicted of an aggravated assault and battery, charged to have been made upon one Bama Jeffries, a female. In order to present clearly the point raised in the record, it is necessary to name the constituent elements of an assault and battery.

The use of any unlawful violence upon the person of another, with the intent to injure, is an assault and battery. From this, two acts must concur, one physical and the other mental,— the act and the accompanying intent. There must be a physical act done by the assailant, which takes effect upon the person of the party assailed. The slightest force is sufficient; the least touching of the person of another will suffice. The act done or force used which takes effect must be intended, otherwise it would be accidental and therefore not unlawful. To the intended act or force must be added the intent to injure the party assailed. The injury intended may be to the feelings or mind, as well as to the person. The violence being used or the act being done, if the natural consequence of the act or violence is an injury, the law presumes this injury to have been intended, unless it be shown that the intention was innocent and not culpable. When an injury is actually inflicted upon the person, the presumption that it was intended obtains. If to the mind, or feelings, the act or violence used must in its nature be calculated to wound or injure before the intention to injure will be presumed. When it is sought to convict for an injury to the feelings or mind, the character of a person assaulted with all of the surrounding facts become of vital importance in determining whether there was an intent to injure.

This is emphatically true with the case now before us. The facts constituting the assault and battery in this case, and relied upon by the State, are: "that the defendant took hold of the prosecutrix, and attempted to have carnal knowledge of her against her consent, thereby wounding her feelings." The issue was solely the intent to injure her feelings. The defendant denied the intent, and also that there was in fact an injury inflicted upon the mind or feelings of this prosecutrix. The statement of facts shows the contest to have been over this fact,—did the defendant intend to wound the feelings of the prosecutrix? The acts or violence used upon the person of the prosecutrix being in their nature calculated to wound her feelings, the law would presume the intent. But this is not a conclusive presumption; it is open to proof, and the real fact may be shown. And as bearing directly upon this point, the defendant by attorney asked the witness Bama Jeffries, whether or not the defendant had ever had sexual intercourse with her prior to the time of the assault and battery. This was objected to by the county attorney upon the ground that the answer to such question would render the witness infamous. The court instructed the witness that she need not answer any question the answers to which would tend to criminate her. The witness refusing to answer, the defendant excepted.

It is the duty and province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in a chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for his conviction." "In such a case the witness must himself judge *what his answer will be*, and if he says on oath he cannot answer without accusing himself, he cannot be compelled to answer." *United States* v. *Burr*, 1 Rob. R. 207; *The People* v. *Mather*, 4 Wend. 254; *Floyd* v. *State*, 7 Texas, 215.

Under another rule upon this subject it is unnecessary to decide whether this question embraced an answer which would form a necessary link in the chain of evidence required to convict of an offense. This could occur only in case of a prosecution for adultery; and under our Code this is rendered quite doubtful. The rule referred to is this: "A witness cannot be compelled to answer when his answer will subject him to a penalty, or will have a tendency to degrade his moral character, unless his evidence bears directly on the issue." *People* v. *Lohman,* 2 Barb. 216; *Lohman* v. *The People,* 1 Const. 379; *People* v. *Rector,* 19 Wend. 569.

Does the proposed question bear directly on the issue? Evidently it does. If so, the defendant was entitled to it; and the court should have compelled the witness to an answer of the question. The intention to wound the feelings of the prosecutrix being the issue, acts of lewdness between these parties were of the highest importance as tending to elucidate this, the only issue. Suppose the prosecutrix to have been a bawd or the inmate of a house of ill-fame, and this had been known to the defendant, could any sane person presume from the acts or violence, so called, used in this case, that there was an intention to insult her modest feelings and arouse her virtuous indignation? By no means. We have none so credulous. If the probabilities should be against the intent in the above case, certainly former acts of lewdness between the parties would be very material evidence tending to negative the intent to wound the feelings of the prosecutrix. Not only so, but these acts would tend to call in question,—raise a doubt,—of actual injury as well as the intent to injure. We are of the opinion, therefore, that the court below erred in not compelling the witness to answer the question.

We will not pass upon the sufficiency of the evidence to support the verdict, further than to observe that its intrinsic weakness intensified the error above noticed.

The judgment is reversed and the cause remanded.

Reversed and remanded.

T. E. BERRY v. THE STATE.

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1. **REFUSAL TO SWEAR TO TAX-LIST — INDICTMENT.— Article 118 of the Penal Code, whereby penalties are provided for persons who refuse to render their property for assessment, or to swear to the list rendered, etc., must be construed in connection with the provisions of the Civil Statutes which prescribe the duties in this regard of all owners and holders of taxable property. Therefore an indictment based on said article 118 should allege the year for which the defendant's taxable property was assessable.**
2. **JURY — OATH.— The record on appeal must show that the jury were sworn.**

APPEAL from the County Court of Collin. Tried below before the Hon. T. C. GOODNER, County Judge.

P. B. Muse and *M. H. Garnett*, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Omitting the formal facts, we find the offense set forth in the indictment in the following language, viz.: "That Thomas E. Berry, late of the county of Collin, on or about the 7th day of May, in the year of our Lord one thousand eight hundred and eighty, with force and arms, in the county of Collin and State of Texas, did then and there unlawfully and wilfully fail and refuse to qualify to the truth of his statement of taxable property, when called upon in person by the assessor of taxes for Collin county, Texas, to qualify to said statement; said Berry being then and there called upon in person by W. G. Barnes, being then and there assessor of taxes for Collin county in the State of Texas, duly elected and qualified, and acting as said officer, said Berry being then and there a citizen of said county and subject to assessment for taxes therein; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The statute upon which this indictment was brought provides that, "if any person shall refuse to make out and render a list of his taxable property when called upon in person by the assessor of taxes or his deputy, or shall fail or refuse to qualify to the truth of his statement of taxable property, or shall fail or refuse to subscribe to any oath or affirmation required by law in the rendition of taxable property, he shall be fined in any sum not less than twenty nor more than one thousand dollars." Penal Code, art. 113.

This statute must necessarily be taken and construed in connection with art. 4680 of the Revised Statutes, which declares that "each person required by law to list property shall make and sign a statement, verified by his oath as required by law, of all property both real and personal in his possession or under his control, and which he is required to list for taxation either as owner or holder thereof, or as guardian, parent, trustee, executor, administrator, receiver, accounting officer, partner, agent, or factor."

The indictment as above set out, we are of opinion, is fatally defective in that it does not allege the year for which the statement of the defendant's taxable property was required to be made out, to the truth of which he failed and refused to qualify. The statute requires that "all property shall be listed for taxation between January 1st and June 1st of each year, when required by the assessor, with reference to the quantity held or owned on the first day of January in the year for which the property is required to be listed or rendered." Revised Statutes, art. 4674. But we are not informed by allegations in the indictment, except inferentially, that the statement of his taxable property, which defendant refused to verify by affidavit, was for the year 1880. This allegation was essential.

It appears to us that the proper mode of stating the charge would have been substantially, that the said Berry, having taxable property, and being a person required by law to render a list and statement of the taxable property owned and possessed by him on the 1st day of January, 1880, and having made and rendered said statement, failed and refused to qualify to the truth of the same when called upon in person by the assessor or his deputy to do so. This would have met the demands of the statute, and have left nothing to inference or intendment. These facts were all necessary to be proven, and it is expressly provided that "everything should be stated in an indictment which it is necessary to prove." Code Crim. Proc. art. 421.

But, even if the indictment were good, there is another error for which the judgment would be reversed. The record fails to show that the jury which tried the case were ever sworn. This it must do affirmatively, as has been repeatedly held. *Nels* v. *State*, 2 Texas, 280; *Baird* v. *State*, 38 Texas, 599; *Cannon* v. *State*, 5 Texas Ct. App. 34; *Kennon* v. *State*, 7 Texas Ct. App. 326; *Howard* v. *State*, 8 Texas Ct. App. 612.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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S. A. McAdams and others *v.* The State.

1. **Bail Bond.**— It is not sufficient that a bail bond describe some offense against the laws of this State. It must describe the one of which the principal obligor stands charged.
2. **Same — Case Stated.**— The indictment charged the theft of certain cattle, the property of "J. P. and A. C." The bail bond described them as the property of J. P. *Held*, a fatal variance.

Error from the District Court of Denton. Tried below before the Hon. J. A. Carroll.

The opinion discloses the case.

Piner & Austin, for plaintiffs in error.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. "It is not sufficient that a bail bond named some offense known to the laws of the State. The offense named in it must be the offense of which the principal obligor stands charged. If it names a different one, the sureties may avail themselves of the variance." *Smalley* v. *State*, 3 Texas Ct. App. 202, and authorities cited.

In the case before us the indictment described the offense as theft from the "possession of Jessee Parker and Andrew Crosier, of a certain cow of the value of ten dollars, a certain steer of the value of fifteen dollars, a certain heifer of the value of six dollars, and of the aggregate value of thirty-one dollars; the said cow and steer and heifer being then and there the personal property and neat cattle of them the said Jesse Parker and Andrew Crosier," etc.

The forfeited bail bond recited the offense as "theft of a certain cow, the property of Jesse Parker." No part of the descriptive identity of the offense as stated in the indictment could on the trial have been dispensed with as surplusage. *Warrington* v. *State*, 1 Texas Ct. App. 169. Doubtless, however, the bail bond would have been sufficient had it described the offense as theft of cattle, the property of Jesse Parker and Andrew Crosier; for then there would have been no room for variance. As it was, the variance between the bail bond and the indictment is fatal, and the judgment is reversed and cause remanded.

Reversed and remanded.

C. W. TROY v. THE STATE.

1. PRACTICE — FORMER ACQUITTAL. — A plea of former acquittal setting up facts which. if true, would constitute a bar to the prosecution, presents an issue for the determination of the jury under proper instructions, and the court erred in striking it out upon motion of the State.
2. SHEEP-INSPECTOR'S DUTIES. — The act of March 25, 1879, entitled "An act to protect the wool-growing interests of the State of Texas," provides for the appointment of inspectors in certain counties, and defines their duties. Section 5 of the said act provides that whenever an inspection of any flock or herd of sheep is had, under the provisions of the act, and such inspection discloses the presence of "scab" or other infectious or contagious disease, it shall become the duty of the inspector to notify at once the owner or person in charge, and prescribe certain limits within which the said flock shall be herded until cured.
3. SAME. — Section 10 provides that "any owner or person in charge of sheep who shall wilfully or knowingly fail to comply with or shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten nor more than one hundred dollars." (See Rev. Stats. Appendix, pp. 18 and 19.)
4. SAME — CHARGE OF THE COURT. — The material questions of fact in this case being whether or not the sheep of the appellant were infected with "scab," and whether or not the appellant violated the act in relation thereto, the charge of the court should have submitted these issues to the jury.

APPEAL from the County Court of Atascosa. Tried below before the Hon. H. L. HARRISON, County Judge.

The information charged the appellant with the violation of the act of March 25, 1875, entitled "An act to protect the wool-growing interests of the State of Texas," by wilfully removing his sheep from prescribed limits after notice that they were infected with scab. He was tried, convicted, and a fine of $85 imposed by the jury.

A. W. McClure testified in substance, for the State, that he was the legally elected and qualified inspector of sheep for Atascosa county on the 15th day of December, 1879; that about one week previous to that day he was informed by M. C. Yates and C. O. McClure, two credible sheep-owners of the county of Atascosa, that they had applied to the defendant for permission to examine his herd of sheep then in that county, but had been refused. They requested the witness to inspect the defendant's herd, and upon their request the witness went to the defendant's herd on the said 15th day of December, and had the sheep penned and four of the sheep caught and brought to him. These he examined, and found to be infected with scab. He went through the rest of the flock, numbering about fifteen hundred, and noticed many others that were similarly affected. He thereupon notified the defendant that his sheep were so infected, and prescribed certain limits within which they were to be herded. This notice was given in writing, and it was produced in court, identified, and read in evidence. The witness qualified himself as an expert, and declared that the disease with which the sheep were infected was "scab."

This witness testified that on the 4th and 5th days of January, 1880, he saw the said sheep in the charge of herders, from three-quarters to a mile off the prescribed limits. When the witness gave the written notice spoken of, the defendant said angrily that there was no law in force authorizing the inspector to prescribe limits, etc., and the witness assured him that there was such law and proposed to show it to him. He then said to witness that he could not be kept off the International Railroad lands, and that if there was any law for the notice he would secure San Antonio lawyers and litigate it if necessary through the higher courts. Witness had never given the defendant a certificate that his sheep were cured.

M. C. Yates, for the State, testified that during the month of January, 1880, he saw the defendant's sheep on both sides of Salt Branch in charge of a Mexican named Tobitia. He knew the sheep he saw were defendant's only by the Mexican telling him so. He had never previously seen the defendant's sheep that he knew of. McClure, being recalled by the State, stated that Salt Branch, where Yates saw the sheep as testified by him, was three quarters of a mile distant from the prescribed limits, and that the Mexican Tobitia was at that time herding sheep for defendant.

Harvey Troy, for the defense, testified that the defendant was his father. He and the Mexican Tobitia herded his father's sheep. The witness was with the sheep daily, and knew that they had not been across the prescribed limits, which comprised the "Palmer survey." In endeavoring to keep the sheep on the survey he was guided by two stakes indicating the lines.

A. M. Lewis testified that he and defendant were neighbors, and he saw defendant's sheep two or three times per week. He saw them on December 25, 1879, and did not think that they then had the "scab." The witness had sheep running with defendant's herd, and having heard that defendant's flock was infected with scab, went to his place to cut his out of the flock. He threw several of them, examined them, but found no scab. The witness was a sheep-owner.

Cross-examined, the witness did not claim to be an expert, and would not declare positively that defendant's sheep did not have the scab, but he did not think they were so infected.

J. D. Morrison, for the appellants.

Horace Chilton, Assistant Attorney General, and *H. M. Holmes*, for the State.

WINKLER, J. The appellant being prosecuted in the County Court by information for an alleged violation of certain provisions of the act of March 25, 1879, entitled

"An act to protect the wool-growing interests of the State of Texas" (Appendix to Revised Statutes, 18), interposed as a defense to the prosecution the following plea of former acquittal, to wit: "And now comes the defendant and says that heretofore, to wit, at the December term, 1880, of the County Court of Atascosa county, he has been tried by a court of competent jurisdiction, under a good and sufficient information, of the offense wherewith he is charged in the information exhibited against him, because he says that the offense charged in the information in case No. 63 on the docket of said court, upon which he was tried and a verdict of not guilty rendered by the jury, was a part and parcel of the same transaction, identical in the period of time, place and circumstance with the matter charged against him in the information now exhibited; and this he verifies. Wherefore he enters this his plea of *autrefois* acquit, and therefore prays judgment." The plea was signed by the defendant, sworn to before the clerk, and filed.

The county attorney excepted to the defendant's plea of former acquittal; which exception on argument the court sustained and struck out the plea, and the defendant excepted to the ruling. On the trial it became a question whether the defendant's flock of sheep were infected with a disease called scab, or not, and testimony was introduced on both sides of the question. The court, at the request of the county attorney, gave certain instructions to the jury which were excepted to by the defendant's counsel, and especially the 4th clause of the charge, as follows: "4th. The inspector of sheep may inspect any flock of sheep in his county which he has information from two or more credible sheep-owners is affected with scab or any infectious or contagious disease, and if the inspector does his duty the validity of his acts are not impaired or destroyed because his informants may not have complied with their duties under the law before they notified the inspector." The defendant's counsel asked the court, among other things, to instruct the jury as follows: "If the jury believe from the evidence that the sheep of the said C. W. Troy did not have the scab, they will find him not guilty. If the jury believe from the evidence that the defendant did not wilfully violate the law in keeping his sheep in the limits prescribed by the inspector, you will find him not guilty." The court refused to give these instructions to the jury, and the defendant's counsel excepted to this action of the court.

We are of opinion that the court erred in sustaining the exceptions of the county attorney to the defendant's plea of former acquittal, and in striking out the plea. If the matters stated in the plea were true in fact, they would have constituted a bar to the present prosecution, and whether the first prosecution and the second were in fact for the same offense or not should have been submitted to the jury, in connection with the plea of not guilty, under proper instructions by the court.

The whole tenor of the act the defendant is charged with violating indicates very clearly that the main object sought to be attained by it was, as indicated by the title, to protect the wool-growing interests of the State in the counties not excluded from its operation, against scab or any other infectious or contagious disease. The disease the defendant's flock is charged to have been infected with is scab. The act provides for an inspector and prescribes his duties. Section 5 enacts that "whenever upon the examination and inspection, herein provided, of flocks herded or kept in the county, scab or any infectious or contagious disease is ascertained to exist in any flock, the inspector shall at once notify the owners or persons in charge thereof of said fact, and shall prescribe certain limits within which said flock shall be herded until cured."

In section 10 it is provided that "Any owner or person in charge of sheep who shall wilfully and knowingly fail to comply with or violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten nor more than one hundred dollars." A different section prescribes a different penalty to be imposed upon the inspector for failing in his dutise, but with this we have no concern at present. If, however, the sheep of the defendant were infected with the disease called scab, and he had been properly notified of that fact, and limits had been prescribed within which the sheep should be kept until cured, and the defendant had wilfully and knowingly violated the provisions of the act in the manner charged, then he would be guilty of a misdemeanor; but if not, then he would not be guilty. Hence, in our opinion, it was a material inquiry whether the defendant's flock of sheep had scab or not, and whether, this being the case, he had wilfully and knowingly failed of his duty in the premises; and the jury should have been so instructed in substance, as requested by the defendant's counsel.

Other questions are raised by the record and presented by bills of exception, which we have not taken time to consider at present, as they are not likely to arise upon another trial. For the errors pointed out herein, the judgment will be reversed and the cause remanded.

Reversed and remanded.

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J. C. ELLIS *et al.* *v.* THE STATE.

1. BAIL.—A sheriff making an arrest for misdemeanor under a *capias* is authorized to take bail of the accused either in term-time or in vacation of the court.
2. JUDGMENT final on forfeiture of bail is erroneously entered when it appears that judgment *nisi* was not entered against the principal.
3. SAME—VARIANCE.—When it appears that the judgment *nisi* is

against the surety alone, and the *scire facias* recites a judgment against both the surety and the principal, the variance is fatal.

4. **Judgment.**— Final judgment cannot stand that does not specify with certainty the amount adjudged.

5. **Same — Practice.**— In this case the record recites that a motion was made to correct the judgment *nisi*, yet it does not appear that the principal was in court, or that he had been served with notice of the motion; nor does it appear that the motion was made until after the entry of final judgment, nor that the correction of the judgment was made in fact, though the motion seems to have been granted by the judge. Under such circumstances final judgment on a forfeiture of bail bond cannot stand.

Appeal from the County Court of Wilson. Tried below before the Hon. W. L. Worsham, County Judge.

The opinion discloses the case.

A. J. Williams, for the appellant.

H. M. Holmes, for the State.

Winkler, J. The record recites in effect that J. C. Ellis was arrested by the sheriff on a *capias* issued by the clerk charging him with an assault and battery, and entered into bond, with R. W. Franklin as surety, in the sum of one hundred dollars, conditioned that he appear before the County Court of Wilson county, to answer an indictment to be exhibited against him for the offense. The appearance bond was dated November 3, 1874, approved by the sheriff without date, and filed November 3, 1874. The date of the bond and its having been filed the same day is sufficient, it not being controverted, to indicate that it was approved by the sheriff on the date it appears to have been executed by the obligors and filed by the clerk.

It is pretty plainly indicated that the County Court of Wilson county was in session at the time the appearance bond was taken, and hence the question arises whether the sheriff, when he arrested the defendant, had authority to take and approve the bond, or whether he should not have taken him before the court, it being in session, and have caused him to enter into recognizance in open court to answer the charge preferred against him. If the crime for which the arrest was made had been a felony, and the arrest had been made in the county where the prosecution was pending, and during a term of the court from which the *capias* had issued, then the sheriff would have been prohibited by law from taking bail, and it would have been the duty of the sheriff or other officer making the arrest to forthwith bring the defendant before the court to be dealt with by the court, according to law. Code Crim. Proc. art. 466. But, "in cases of misdemeanor, any officer making an arrest under a *capias* may take bail of the defendant, either in term-time or in vacation." Code Crim. Proc. art. 470; Clark's Texas Crim. L. art. 1290.

Offenses are divided into felonies and misdemeanors (Clark's Texas Crim. L. art. 53), and are thus defined: "Every offense which is punishable by death, or by imprisonment in the penitentiary, either absolutely or as an alternative, is a felony; any other offense is a misdemeanor." Penal Code, art. 54. The punishment for a simple assault or assault and battery, the offense here charged, not being punished by death or by imprisonment in the penitentiary either absolutely or as an alternative, does not come within the definition of a felony and must be classed as a misdemeanor, the punishment being fixed when unattended with circumstances of aggravation, at a fine of not less than five nor more than twenty-five dollars. Penal Code, art. 495. The offense of which the defendant was charged, and for which he had been arrested under a *capias*, being a misdemeanor, the sheriff had authority under the law to take the bond of the defendant, either in term-time or in vacation.

The following errors, however, appear to have been committed in the court below, for which the judgment must be reversed: 1. The judgment *nisi* was not entered against the principal. 2. There is a material variance between the judgment *nisi* and the *scire facias*, in this, the judgment *nisi* is against the surety alone, whilst the *sci. fa.* recites a judgment against both the principal and the surety. 3. The final judgment does not specify with certainty the sum of money adjudged; and 5, whilst the record recites that a motion was made to correct the judgment *nisi*, it does not appear that the principal was in court, or that he had been served with notice of the motion, nor does it appear that the motion was made until after the entry of final judgment, nor yet does it appear that the correction of the judgment was made in fact, though the motion seems to have been granted by the judge.

The judgment must be reversed, and the proceedings, going back to and including the forfeiture of the bond and the judgment *nisi*, are set aside, and a new trial awarded.

Reversed and remanded.

JUAN PEREZ *v.* THE STATE.

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1. INFORMATIONS — PRACTICE. — The better practice in cases where the information has been torn and so mutilated as to render illegible an entire line, would be to substitute the document under the provisions of art. 434, Code Crim. Proc.
2. SAME. — An information in misdemeanor cases not based upon a complaint is insufficient to charge an offense, and upon motion or exception should be quashed. And such an exception would also be good on motion in arrest of judgment.
3. AFFIDAVIT of a party who had been made infamous by reason of his previous conviction of a felony is not a legal or valid foundation for an information, and such exception, if sustained by proper evidence, would be available by a motion to quash or in arrest of judgment.
4. EVIDENCE. — The judgment of conviction and that alone is the legal

and conclusive proof of the affiant's conviction, and his consequent infamy, and proof that the records of the court in which he was convicted were partially searched without finding the judgment, and that those records were voluminous, does not bring the defense within the rule which would allow it to resort to secondary evidence to show the affiant's infamy.

5. MOTION IN ARREST OF JUDGMENT for such a cause is insufficient unless accompanied by the judgment, or an authenticated copy of the same, when no sufficient predicate for secondary evidence of the conviction had been laid.

6. EVIDENCE.— See evidence held to be insufficient to support a verdict of conviction for an assault.

APPEAL from the County Court of Wilson. Tried below before the Hon. A. H. ABNEY, County Judge.

The information was based upon the affidavit of Juan Hernandez, and charged the appellant with an aggravated assault and battery. On trial he was found guilty of a simple assault, and his fine fixed at $2.50.

Frank Payne was the only material witness for the State, and he testified that, while sitting in front of Abney's store in Lodi, on the 24th day of June, 1879, he saw Hernandez walking along the road about one hundred yards distant, drunk and laden with bundles. The defendant, on horseback, ran up from behind rapidly and reached forward and either pushed or pulled Hernandez, who fell, scattering his bundles. Hernandez got up immediately. The witness did not think that the defendant's horse struck Hernandez, nor did he know that it was the defendant's intention to injure Hernandez. The remaining witness merely saw the defendant's horse running and Hernandez regaining his feet. The 24th of June was "San Juan's" day with the Mexicans, which they habitually celebrate by fast riding and drinking.

The substance of the testimony of Grier, for the defense, was that defendant's horse became unmanageable, and he had to push Hernandez to keep from running over him. The defendant called to Hernandez to get out of the way before he reached him, which Hernandez failed to do, and in the opinion of the witness the push alone prevented him from being run over. The witness rode from an adjoining town with the defendant that morning, and observed that his horse was not bridle-wise, and was consequently difficult to control.

A. J. Williams, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, J. The information having been torn in two and mutilated thereby to the extent that one entire line was illegible, the better practice would have been for the county attorney to have substituted it under the provisions of art. 434, Code Crim. Procedure.

In misdemeanor cases the law contemplates and requires that the information shall be based upon the complaint, and the complaint is a fundamental part of the information. Acts 1876, p. 87, § 15; Code Crim. Proc. art. 36. Without a complaint upon which to base it, a motion to quash or exceptions to the information would be good in law. Any inherent defect in the complaint might, we also apprehend, be reached by a motion to quash or exceptions to the information. Our statute further provides that "a motion in arrest of judgment shall be granted upon any ground which would be good upon exceptions to an indictment or information for any substantial defect therein." Code Crim. Proc. art. 787. Infamy occasioned by a party's having been convicted of felony renders him incompetent to testify, under our statute. Code Crim. Proc. art. 730, subdiv. 5. Not only so, "but it is said that his affidavit cannot be read to support a criminal charge." Whart. Crim. Ev. (8th ed.) sec. 364; *Long* v. *State*, *ante*, p. 186.

A complaint made by a party thus infamous is not a legal and valid foundation for an information, any more than his testimony would be admissible as legal evidence; and such an objection to a complaint would, if sustained by proper evidence, be good on a motion to quash or exceptions. If good on a motion to quash, then it would be equally available on a motion in arrest of judgment.

In the case under consideration, however, the defendant did not bring himself within the rule which would allow secondary evidence of affiant's infamy. Neither the fact that the records of Bexar county had been partially searched and searched in vain for the judgment of conviction, nor the fact that the records were voluminous, would avail. It is the judgment of conviction, and that alone, which is the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify. 1 Greenl. Ev. sec. 375; *Cooper* v. *State*, 7 Texas Ct. App. 194. The motion in arrest in this case was not sufficient, because not accompanied by the judgment or an authenticated copy of the same.

We are of opinion, however, that the motion for a new trial should have been granted. We are clearly of opinion that the verdict and judgment are against the evidence, and we cannot give our assent to its sufficiency to support them.

The judgment is reversed and the cause remanded.

Reversed and remanded.

BOB VINCENT *v.* THE STATE.

1. THEFT — RECEIVING STOLEN PROPERTY.— It being enacted in this State that the offense of theft comprises all unlawful acquisitions of personal property, it is well settled that a conviction for receiving or concealing stolen property may be had under a general indictment for theft of the property. (Hurt, J., dissenting.)
2. VERDICT — CHARGE OF THE COURT.— Unless something appears to the

contrary, it is presumable that the jury expressed their findings responsively to the instructions given them by the court; wherefore, in determining questions involving the import of the verdict, the charge of the court is to be looked to and considered.

3. **SAME.**— In a trial for receiving stolen property, the jury might, under the proof and their instructions, have convicted the defendant either of a felony or a misdemeanor, according to the value of the property. Without specifying the value of the property, the jury found a general verdict of guilty, and assessed a felonious punishment. *Held*, a good verdict.

4. **LIMITATION — CHARGE OF THE COURT.**— It is incumbent on the State to prove an offense not barred by limitation, but, when nothing in the evidence raises a doubt whether the prosecution was barred, there is no occasion for instructions to the jury on the subject.

APPEAL from the District Court of Tarrant. Tried below before the Hon. A. J. HOOD.

The indictment, in the usual form, charged the theft of four hogs, worth ten dollars each; but the case was submitted to the jury as an accusation of receiving the hogs, with knowledge that they had been stolen,— a feature which distinguishes this conviction from the former one, which, as reported in 9 Texas Ct. App. 303, was reversed by this court upon a question not involved in the case as now presented. A term of two years in the penitentiary was the punishment allotted the appellant.

H. M. Furman, for the appellant, filed an able brief and argument.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. On a former appeal this case was reversed because the court failed to charge the law applicable to the facts adduced in behalf of the accused by way of defense. *Vincent* v. *State*, 9 Texas Ct. App. 303.

The indictment was in the ordinary form, and charged the defendant with the theft of four hogs, of the value of ten dollars each. In the charge the court instructed the jury that the State "did not seek a conviction for theft of the hogs named in the indictment, but seeks to convict the defendant under the following statute, viz.: 'If any person shall receive or conceal property which has been acquired by another in such manner as that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, he shall be punished in the same manner as by law the person stealing the same would be liable to be punished.'" Penal Code, art. 743. The charge throughout presented, as the main and sole issue, whether the defendant was guilty of receiving stolen property, knowing it to have been stolen. The charge was excepted to and is claimed to be erroneous.

It is now too well settled in this State to admit of further controversy, that a conviction for receiving or concealing property, knowing it to have been stolen, may be had and will be sustained under an indictment charging theft of the property; because theft includes all unlawful acquisitions of personal property punishable by the Penal Code. Code Crim. Proc. art. 714, subdiv. 6; *Riley* v. *State*, 32 Texas, 771; *Counts* v. *State*, 37 Texas, 593; *Parchman* v. *State*, 2 Texas Ct. App. 229; *McCampbell* v. *State*, 9 Texas Ct. App. 124; *Martin* v. *State*, 9 Texas Ct. App. 294; Clark's Crim. Laws of Texas, p. 295, note 100. Viewed in the light of these decisions, the charge of the court was a full and correct exposition of the law applicable to a charge of receiving stolen property, and no error was committed in refusing the special instructions requested for defendant.

An objection is urged to the verdict of the jury that it is a general finding of guilty, without specifying the value of the property which they found had been stolen by defendant. The verdict finds defendant guilty and assesses his punishment at two years' confinement in the penitentiary. The jury were instructed by the charge of the court that they would only imprison in the penitentiary in case they found the value of the property to be over twenty dollars, and were fully instructed as to a different punishment in the event the property stolen did not amount in value to twenty dollars. If there were any doubt about the offense of which the accused was found guilty, the charge of the court would be looked to in solution of the doubt; the jury must always be presumed to have expressed their finding with reference to the charge of the court, unless they also state something which shows that such was not their intention. *Darden* v. *Mathews*, 22 Texas, 326; *Patterson* v. *Allen*, 50 Texas, 23; *Marshall* v. *State*, 4 Texas Ct. App. 549; *Hutto* v. *State*, 7 Texas Ct. App. 44, and authorities cited.

Another objection made to the charge of the court is that it did not inform the jury of the period of limitation which would restrict their investigations in the case; in other words, that, if they found defendant guilty of a felony, they could only do so in case they believed the crime was committed within five years next before the presentment of the indictment. Code Crim. Proc. art. 198.

There was nothing in the evidence to raise the question of limitation. The indictment charged the offense to have been committed on the 30th day of January, 1880; the evidence showed it was in fact committed about the 1st of February, 1880, and the indictment was filed on the 20th of February, 1880. Whilst it is true that the State, under a plea of not guilty, must establish a case that is not barred by limitation (*State* v. *Carpenter*, 74 N. C. 230), yet, if the evidence raises and could possibly raise no issue upon that subject, the court is not bound to charge upon it.

Nor did the court err in refusing to exclude from the jury the testimony of John Turner, who had turned State's evidence. His testimony was both pertinent to and admissible upon the issues being tried. In our opinion the evidence sustains the verdict and judgment. No error of magnitude sufficient to require a reversal of the judgment having been made to appear on this appeal, the judgment is affirmed.

Affirmed.

HURT, J., does not concur in the portion of this opinion which decides that under a charge of theft an accused can be convicted of receiving and concealing stolen property, knowing it to have been stolen.

AUGUST MARKS *v.* THE STATE.

1. PRACTICE IN THIS COURT IN MISDEMEANORS.— To the rule that errors in misdemeanor cases will not be revised when exception was not reserved in the trial court, an exception obtains if radical error to the appellant's prejudice is apparent of record.
2. JURY — MINUTES OF COURT.— The record must show that the jury was a legal one, though a general recital to that effect suffices, without naming any juror.
3. JURIES IN THE COUNTY COURTS consist of but six men, and they must unanimously concur in the verdict.
4. CASE STATED.— The entry in a misdemeanor case recited a verdict found by "a jury of good and lawful men, to wit, P. H. Ebner," and that name was signed to the verdict as foreman. *Held*, that no presumption can be indulged in aid of the entry or verdict, which import a jury composed of but one man.
5. QUÆRE, whether the provision of the Revised Code of Procedure that the verdict in a felony case must be signed by the foreman is only directory? But that is the better practice in felony cases.

APPEAL from the County Court of Guadalupe. Tried below before the Hon. W. P. H. DOUGLASS, County Judge.

Ireland & Burges, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Had the appellant been convicted of an aggravated assault, the charge of the court upon that grade of offense, considered in relation to the offense charged in the information, would have been so radically erroneous as to have required of this court a reversal of the judgment, though no exception was saved and proper counter-instructions requested. For, as contended, the rule in misdemeanor cases to the effect that this court will not revise errors not duly reserved by exception in the court below is relaxed when it is apparent that radical error by misdirection of the jury has occurred to the prejudice of the accused. *Haynes* v. *State,* 2 Texas Ct. App. 84. But the accused was not found guilty of an aggravated assault, and it cannot well be perceived how an erroneous charge with regard to that grade of offense could enure to his injury under the circumstances so far as developed by the record. There is no statement of facts or bill of exceptions in the transcript.

There is, however, a fundamental error apparent of record which, though not claimed as error, will require a reversal of the judgment. Defendant appears to have been tried by a jury composed of one juror. The recital in the judgment is, "the defendant August Marks being arraigned plead not guilty, whereupon came a jury of good and lawful men, to wit, P. H. Ebner, who were duly elected, impaneled and sworn according to law, and after hearing the evidence, argument of counsel, and charge of the court, returned into court the following verdict, to wit: 'We the jury find the defendant guilty of a simple assault, and assess the fine at $15. P. H. Ebner, Foreman.'"

In the statute it is provided that "in the District Court the jury shall consist of twelve men; in the County Court and inferior courts the jury shall consist of six men." Code Crim. Proc. art. 395. In the County Court in all criminal actions the jury consists of six men, and the verdict must be concurred in by each of them. Code Crim. Proc. art. 708. We might naturally indulge the presumption that five other jurors were in fact impaneled and sworn, and sat and tried the case with P. H. Ebner, but we are not authorized to presume anything which the record is required to show, and it is required to show that, when one accused of crime is tried by a jury, the jury was a legal one. *Rich* v. *State*, 1 Texas Ct. App. 206; *Huebner* v. *State*, 3 Texas Ct. App. 458. Had the judgment recited that a jury of good and lawful men were selected, impaneled and sworn, we would have held the recital sufficient though no juror's name was mentioned, even as foreman. For it is not necessary to set forth the names of the jurors in the judgment, and before the revision of our Code we had no statute requiring the foreman to sign the verdict. *Morton* v. *State*, 3 Texas Ct. App. 510. Whether the statute which now provides that the verdict shall be signed by the foreman (Code Crim. Proc. art. 706) is only directory, it is not necessary for us to determine. (See Morton's case.) The better practice undoubtedly would be that he should sign it.

Because it appears from the record that appellant was not tried by a legal jury, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

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J. M. SAUNDERS *v.* THE STATE.

1. **PLEA OF GUILTY** to an indictment for felony must be made in open court and by the defendant in person. It may be made orally, but must be entered of record.
2. **SAME — PRACTICE.** — To the validity or acceptance of such a plea in a felony case the Code of Procedure prescribes three indispensable preliminaries, viz., 1, that the defendant be admonished by the trial court of the consequences of the plea; 2, that it plainly appears

that he is sane; and 3, that he plainly appears uninfluenced by any consideration of fear, or by persuasion, or delusive hope of pardon. These prerequisites must be made manifest of record, and cannot be supplied by inference, intendment, or presumption.

APPEAL from the District Court of Erath. Tried below before the Hon. T. L. NUGENT.

The opinion discloses the case.

No brief for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, J. Appellant was charged by indictment in the lower court with the theft of property of the value of fifty-three dollars and fifty cents. It is recited in the judgment that the defendant pleaded "guilty" to the charge. In his instructions to the jury the judge tells them "the defendant Saunders having entered the plea of guilty, you will by your verdict find him guilty and assess his punishment at confinement in the penitentiary not less than two nor more than ten years." Defendant was found guilty, and his punishment was assessed at two years and judgment rendered accordingly.

A motion for a new trial was made and sworn to by defendant, the second ground of which in substance was that the court failed to admonish him of the consequences of pleading guilty to the indictment, and, further, that he was influenced and persuaded by his mother to plead guilty in the hope that by so doing he would get the least punishment imposed by law, and ultimately obtain a pardon from the executive. This motion is also supported by the affidavit of his mother.

With regard to the practice in felony cases, where the defendant pleads guilty, it is provided by statute that "a plea of guilty in a felony case must be made in open court and by the defendant in person, and in such case the proceedings shall be as provided in articles 518 and 519." Code Crim. Proc. art. 534.

"Art. 518. If the defendant plead guilty he shall be admonished by the court of the consequences; and no such plea shall be received unless it plainly appears that he is sane and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon, prompting him to confess his guilt.

"Art. 519. When a defendant in a case of felony persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law and beyond the discretion of the jury to graduate in any manner, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereupon."

"Art. 538. The plea of 'guilty' and the plea of 'not guilty' may be made orally, and shall be entered of record on the minutes of the court."

It will be seen that the statute is imperative where a defendant pleads guilty to a felony, and three things are essential and must concur before he will be even permitted to do so.

1. He shall be admonished by the court of the consequences. 2. It must plainly appear that he is sane. 3. It must plainly appear that he is uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon.

If these matters are essential and must concur to render the plea a valid one, then it seems to us that, as conditions precedent, the record should show their existence. Without their existence, in fact, the plea is no plea in law. A plea is absolutely essential to support a judgment of conviction in any criminal case; for, as has been repeatedly held, without a plea there is no issue for the jury to try or the court to determine. And so it has further been uniformly held that a judgment would be reversed where the record failed to show affirmatively that a plea of not guilty had been entered. If it is requisite that a plea should be shown, then it is requisite that the plea shown should be a good one in law. A plea of guilty, without its concomitants, is not good. They are absolutely essential to its validity and sufficiency, and should affirmatively appear of record.

Mr. Bishop says: "Undoubtedly it is the right of a prisoner competent in understanding and acting in good faith, to plead guilty instead of denying the charge. Yet in various circumstances the court should exercise caution in receiving this plea. For example, in one capital case where the prisoner tendered it, the judges would not accept it till they had explained to him its consequences, sent him back to his cell for reflection, brought him again into court, where the indictment was read to him a second time, and there examined witnesses as to whether he was sane and whether promises of clemency had been made to him. *Commonwealth* v. *Battis*, 1 Mass. 95. Its effect is an admission by record of the truth of whatever is well alleged in the indictment. *Crow* v. *State*, 6 Texas Rep. 334. If the latter is insufficient it confesses nothing, but if good the court may proceed at once to the sentence." 1 Bish. Crim. Proc. (3d ed.) sec. 795; *Carper* v. *State*, 27 Ohio St. 572.

What the Massachusetts court felt constrained to do, in the case cited, independent of a statute to that effect perhaps, our statute requires shall be done in all felony cases. What the statute requires should be done in so important a matter as the plea in a felony case should not and cannot be left to inference, intendment or presumption; the facts which constitute the very gist of such a plea when prescribed must be made manifest of record. As a general rule it is settled that "official persons are presumed to have done their duty, and within their jurisdiction to have performed their official acts rightly." 1 Bish. Crim. Proc. sec. 1131. But such presumptions will not be indulged with regard to the existence of a proper and sufficient plea in a felony case.

Because the record fails to show that the case was tried upon a plea of guilty, pleaded in conformity with the requirements of the statute, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

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J. W. McLAUGHLIN *v.* THE STATE.

1. MURDER — MANSLAUGHTER — CHARGE OF THE COURT.— If in a murder case there be evidence which, however inconclusively, tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury; and it should be given affirmatively, directly, and pertinently to the theory of the case indicated by such evidence. Mere negative or abstract propositions are not sufficient. See this case in illustration.
2. SAME — RIGHT OF SELF-DEFENSE.— In a trial for murder the theory of the defense was that the deceased and one F. had conspired to kill the defendant, and were present and co-operating to that end when he killed the deceased in self-defense. There was evidence tending to prove the presence and concerted action of the deceased and F., but whether the defendant knew that fact or was cognizant of a conspiracy to kill him was determinable only from the circumstances surrounding the parties at the time of the killing. *Held*, that the charge to the jury should not have ignored the participancy of F., or have conditioned the defendant's right of self-defense on the hostile demonstrations of the deceased alone, but should have recognized the right of the defendant to kill either the deceased or F. if it reasonably appeared to him that they were then present and acting together to take his life.
3. MURDER IN THE SECOND DEGREE — PROOF OF MALICE.— At the defendant's first trial for murder he was convicted in the second degree, and, having obtained a new trial, he objected thereat to all evidence tending to prove that the killing was upon express malice. *Held*, that the objection was properly overruled.

APPEAL from the District Court of Montague. Tried below before the Hon. J. A. CARROLL.

The indictment charged the appellant with the murder of one E. O. Driscoll, on March 15, 1879, by shooting him with a pistol. In June, 1880, the case came to trial and appellant was found guilty of murder in the second degree, and a term of five years in the penitentiary was assessed as his punishment. A new trial, however, was granted him, and at the ensuing December term, 1880, the jury found him guilty as before, and awarded him the same punishment.

David Lenox testified, for the State, that at one time the defendant had been in the employ of the deceased as bar-tender, but the business relations of the two terminated several months before the killing of the latter; that at the time of the severance of the business relations between the parties, or shortly thereafter, hard feelings were developed between them, on account of some vulgar intrusion upon his property attributed by the deceased to the defendant, and with regard to the collection of a sum of money due the deceased by the defendant. At the time of the killing, the witness was in the service of the deceased in the capacity of bar-tender. The deceased occupied as his business quarters a house fronting south, the front room being occupied as a grocery store, and the rear room as a saloon. A ten-pin alley, under the same management, ran the length of the two rooms on the east, with a front entrance on the south. On the night before the killing the defendant entered the deceased's business house with a double-barreled shot-gun in his possession, holding his right hand at the hammer. He was angry and asked where that "d—d red-headed son-of-a-b—h" was? and said that he wanted to "settle with him." The witness told him that the deceased was not in, and asked him to leave. He entered the front door of the front or south room, looked into the rear or saloon-room; then into the ten-pin alley, and then went off. When the defendant had gone the witness sent the deceased word at his boarding house not to return to the store that night, but at a rather late hour he did return, one Freeland accompanying him. Referring to antecedent occurrences, the witness said that he had frequently known the deceased and the defendant to curse and abuse each other when they were in whiskey. At about 8 or 9 o'clock on the morning preceding the day of the killing, the witness saw the defendant and deceased quarreling in the street between the saloon and the store of one McNatt, which stood east of the deceased's place. He did not hear what they said, but could tell that they were quarreling by cursing and abusing each other. About an hour later on the same day, witness and deceased were standing in the grocery door facing a drug store west, near which, on the sidewalk, the defendant was standing. The deceased patted his rear parts at the defendant, and the witness a few minutes later heard them quarreling across the street. The defendant asked the deceased what he meant by patting his rear at him; this the deceased denied having done. The defendant denounced him as a liar, and the two quarreled, cursing each other until 'Squire Orr came on the scene and commanded the peace, and they desisted.

When the shooting occurred next day, the witness was standing near the door leading from the grocery to the saloon-room. Going back from this door to the saloon counter, the witness noticed the man Freeland near the billiard table, coming apparently from the west door of the saloon-room and going in the direction of the front room. The shooting was then in progress. When the firing was over, witness, in going into the front from the saloon-room, met the deceased at the door between the two. He was staggering and reeling, and witness laid him on the billiard table in the saloon-room, where, in about one-half hour, he died.

On cross-examination this witness said that himself and deceased had often discussed the various difficulties in which he, witness, and deceased had been engaged, and deceased had often promised to "see him through" any in which he, the witness, should become involved in the future, and had told him that he, the deceased, knew where there was a good place for a hog ranch in the Indian Nation; and that he would furnish witness and his brother, who lived in Red River county, some means, and would send witness his family from Weatherford. In none of these conversations did the deceased say to witness that he would aid him in the manner suggested if he, witness, would kill the defendant, though the deceased may have had such an idea in his mind at the time. Their conversations were of difficulties in general. Some five or six days before the killing, the defendant had a difficulty in the saloon with one Baxter, who had been about Burlington a short time. They both drew knifes, and when, after defendant had finally left, Baxter said that he was "very near killing" the defendant, the deceased said to him, if you had it should not have cost you a cent. Baxter replied that he had money, and displayed a pocket-book containing several hundred dollars. He said he was the son of the governor of Arkansas, and had left trouble behind; "was on the skip." At day-light one morning, two or three days before the killing, witness and deceased were standing together in the saloon when some one came to the side door. The deceased placed himself against the wall to one side from the door, with his hand on his pistol, and told witness to open the door, that "this is as good a chance as I will ever get." The witness declined to do as requested, thinking there would be a difficulty. He told the party to go to the front door, on opening which, he found it to be Jackson White in quest of whiskey for a case of sickness. On the night before the shooting, when deceased and Freeland came to the saloon, after some talk about the defendant coming to the saloon with the shot-gun, Freeland and deceased looked at their pistols, and took a drink. Deceased asked the witness if he, witness, wanted any stock in this matter? Witness replied that he did not; to which deceased responded: "You are a very good bar-tender, but no account in a fight. Freeland will do." Freeland said: "Yes, by G—d, I am Charley at the wheel; I am on the skip for trouble I left in Tennessee." When the deceased, after being shot, was placed on the billiard table, his pocket book was exposed and Freeland reached and took it, but on request of witness delivered it to him. It was found to contain $95. The killing occurred on Saturday, and Freeland left on the following Monday, and had not been heard of since by the witness. He left his shoemakers' tools in his shop. The witness told him, Freeland, that he was accused of shooting at the defendant from the alley door, and advised him to leave.

On re-direct examination, the witness testified that, about a week before the killing, the defendant, who was drunk, came into the saloon and got into a quarrel with the deceased; the latter accusing him of having answered a call of nature in the ten-pin alley. The defendant said that he would do that wherever it should please him, even on the counter. The witness had seen the defendant preparing to perform this operation in the alley-way some time before, but prevailed on him to desist.

L. C. McNatt testified, for the State, that at the time of the killing his dry goods store was situated on the northeast corner of the square, in Burlington, and east of the deceased's business house. About sun-down, the evening before the shooting, the deceased came to the witness' store for his mail, and while there was approached by the defendant with the demand: "By God, why did you put my account in the hands of an officer?" To which the deceased responded, "because I could get no settlement out of you." The defendant replied that the amount was not correct, and that he had been charged with things he did not get. The deceased replied to this by saying that if defendant said he had been charged with things not furnished him, he lied. The defendant said that either deceased or some of his clerks had so charged him. They continued to quarrel and abuse each other until finally witness told them to desist and go to supper. The witness then went into the house, but, going out again very shortly, met the defendant going in the house, but did not see the deceased anywhere about. The witness went to supper, and returning about dark, saw the defendant on the porch at his store, holding a shot-gun down by his side. The witness went into his store and does not know where the defendant went. From witness' porch to the usual pass-way of the deceased, to and from his supper, the distance is about thirty or forty yards.

The witness was in his store next day, when the killing took place, and heard the first shot, after which the firing became rapid, from six to nine shots being fired. After the firing ceased, the defendant ran by the witness' store, and left his pistol on a box in front. There were four barrels freshly discharged.

Cross-examined, this witness stated that he had paid or agreed to pay G. W. Barefoot $25 to assist in securing counsel to aid in the prosecution of the defendant, and had also signed, as security for the heirs of the deceased, a note for $300 for the same purpose. Barefoot was the partner of the deceased, and is now his administrator. The pistol used by the defendant in the killing belonged to Howard Laforce.

Wade Horton testified, for the State, that he was in the employ of the deceased at the time of the killing.

He gave substantially the same account of the quarrels in the street preceding the killing, and of the defendant's coming to the deceased's place of business the night before the killing, armed with a shot-gun and hunting deceased, as that given by Lenox, adding, with reference to this last, that when the defendant left the store that night, he, witness, went to the door and saw that defendant was joined in the street by two other parties, one of whom was a brother of defendant. He testified to nothing as having passed between deceased and Freeland after they came to the store that night, but that he left them and Lenox there. On the next morning, when the killing occurred, witness was in the S. W. corner of the saloon room, near a window from which he could see all that passed in the grocery room. He saw the deceased standing in the front door, and the defendant out on the ground in front, and heard them quarreling. Just as the witness observed them the defendant shot, and immediately the deceased shot. The defendant's first was the fatal shot, the witness observing the dust fly from the back of deceased's coat as the ball passed out.

On cross-examination this witness said that, having called the deceased on business into the store, and away from the quarreling in the street near the drug-store, he advised deceased to have nothing to do with defendant; and that persistent aggravation would result in trouble. Deceased replied that if trouble came he, deceased, would not be in it, but had his man picked, $100 in his pocket, and a good horse in the Indian Nation. The witness then recounted, as Lenox did, the circumstance of the exposure of deceased's pocket book after his death, Freeland's taking it, and on demand returning it to Lenox, adding that Freeland left the country within very few days after the tragedy. He further testified that, on each occasion of the street quarrels of which he and Lenox testified, Freeland occupied positions at defendant's back, but the witness did not see that he had arms about him. On the morning of the killing, the defendant passed the store several times going from McNatt's to Stone's stores; and when deceased would see him, he would shake some chains that hung at the door, and call him "big-bull." The deceased always carried an ivory-handled six-shooter, 45 calibre, pistol. It was empty after the firing, held the six cartridge shells, and was warm.

Henderson Cook, for the State, testified that he was present in the saloon the night before the killing, and corroborated Lenox and Horton entirely as to the defendant's visit to the saloon, armed with a shot-gun, and making inquiries for the deceased, etc.

C. E. Noyes, for the State, after detailing several wordy difficulties between the defendant and the deceased, including those referred to by preceding witnesses, testified that, a short time after leaving the defendant in the drug-store (at which time he also noticed the deceased standing in the saloon door), he saw the defendant standing near the saloon door, with his hand behind him, under his coat; heard him cock a pistol, saw him present the pistol and fire, saw the deceased return the fire immediately; after which he heard several shots. The defendant had on a heavy overcoat, and his pistol was under it.

J. H. Stone testified, for the State, that at the time of the shooting he occupied a position about 30 yards S. W. from the front of the grocery, on horseback, in plain view of both parties. Deceased was standing in his front door. The defendant was standing outside, in front of, and near the deceased. His hat was lying on the ground, 6 or 8 feet S. W. from him. They were quarreling, cursing and taunting each other of fear. They stood thus about five minutes after witness first saw them, when the defendant drew his pistol and dropped it at his side; the deceased at the same time drawing his far enough from his bosom to expose the handle to the witness. The defendant then put his pistol under his coat, keeping his hand on it, and deceased dropped his back into his bosom, keeping his hand there. The defendant again drew his pistol from behind him, brought it down in front of him with the muzzle directed towards the feet of deceased. The deceased drew his pistol from his bosom until the witness could see nearly the whole of it, and stopped. The defendant then asked, "What do you mean?" The deceased replied: "By G—d, I mean business; what do you mean?" Defendant, raising his pistol, said "if I must, I must," and fired, the deceased firing nearly at the same time. The witness "would not like to say which fired first,—it was so near together." He was certain, however, that the defendant drew and presented his pistol first, though the actions of the parties were nearly simultaneous.

Cross-examined, the witness stated that in his opinion there were altogether some eight or nine shots fired during the fight, but he could not say positively how many. The first two he knew were fired by defendant and deceased. Two shots struck near witness, which in his opinion could not have been fired by either defendant or deceased. A shot fired by the deceased, who stood inside the door, at the defendant, who faced him from the outside, would not have coursed to where these shots struck. Shots fired at defendant from the front of the alley would have had range with the points where these two shots struck.

Jason White, for the defense, testified that very early one morning, two or three days before the killing, he went to the side door of deceased's saloon and tried to get in to purchase some whiskey for a sick child, but was refused admittance there, and directed to go around to the front door. On being admitted there, he found Lenox and deceased. Very early on the morning of the killing, he went to the grocery of deceased to procure some potatoes; after purchasing which, he and deceased stood for awhile in the door. During this time the defendant passed by, going towards the drug-store. The deceased hailed him, asking where his shot-gun was,—told him he had best go and get it, and when he got it to use it. Defendant remarked to deceased that he was not armed, and deceased advised him to go and get his arms, and to be sure to use them, adding that it was no more reprehensible to carry a shot-gun during the day than at night. The witness did not think that the defendant would have stopped had he not been hailed by the deceased.

Isaac Beasley, for the defense, testified that he saw a quarrel between defendant and deceased, about dark on the evening before the killing, near McNatt's store, during which defendant asked deceased, "why are you always abusing me when you know I am not armed?" to which deceased replied: "G—d d—n you, go and arm yourself. I will bet you will not do it. I will stay here and wait until you come back and see if you do." The defendant went off towards home, and witness left the deceased standing near McNatt's store, and did not know where he went afterwards.

Cross-examined, the witness said that the shot-gun defendant had on the night before the killing belonged to his, witness', brother. He did not know who gave it to defendant; witness did not. The witness at the time was living in the same house with defendant.

Byron Hill testified for the defense that, at the time of the killing, he was clerking in Stone's drug-store. He heard some quarreling in front of the saloon, and about that time heard Freeland give three or four blasts on his flute and saw him start in a rapid walk across the street from his shoe shop, go in the west door of the saloon, turn as though he were going into the front room of the saloon, and about this time the shooting commenced. Stone, the witness' employer, had a Winchester rifle, which he had been keeping in the store, but which he had carried home a few days before. Freeland desired witness to keep the gun at the store; and said some "d—n son of a b—h" was going to be killed, and he would have to "skip out." He also told the witness that he should keep the gun in the store, so that if either witness or himself should get into trouble the gun would be "handy," and the two could help each other; that if witness were attacked he, Freeland, could kill the assailant from his shop window. He had told witness that he was on the "skip" from Tennessee on account of trouble. He left the country a few days after the killing, leaving his shop, tools, flute and horse undisposed of, and the witness had heard nothing of him since. Stone's drug-store is across the street from and nearly opposite the west door of deceased's saloon, and Freeland's shoe shop adjoined the drug-store on the north and fronted the same way.

On cross-examination, the witness stated that when the defendant was placed under arrest, he among others was placed in charge of him as guard, and that one night the defendant escaped from them, into the Indian Territory, from where he was brought by Constable Bagley.

J. P. Stone, proprietor of the drug-store, testified for the defense that in the morning, about one hour before the killing, while the defendant was standing in the drug-store door, witness saw the deceased standing across the way in his own door, laughing, dancing, whistling, and patting his rear at the defendant as though to tantalize him, and knew from the defendant's appearance that this conduct angered him. He advised the defendant, however, to have no difficulty with deceased, and received his promise that he would not. Just before the killing he saw the defendant leave the drug-store and go in the direction of McNatt's, and saw that as he, defendant, was about to pass in front of deceased's store, some one rattled some chains, and reached out and knocked off the defendant's hat. The witness did not see the person who did this. In a short time the shooting commenced. Freeland tried on several occasions to purchase a Winchester rifle from witness, but the latter would not sell, because of the difficulties between defendant and deceased, and he, witness, believed that Freeland was "backing" deceased. Freeland tried also both to borrow and buy a horse from witness, but this he also refused. The witness agreed to sell the gun to Dr. Burns, a partner of deceased, but finding, before the sale was consummated, that he wanted to buy it for Freeland, refused. When Freeland left the country he left on foot.

On cross-examination, the witness stated that on that morning and before the shooting, the defendant told him at the drug-store that he had been drinking and was sick, and witness gave him not more than two drinks of whiskey. He advised defendant to have no trouble with deceased, and he said he would not go about the saloon, and that he would be satisfied if he could give deceased "a good whipping." Defendant lived in Burlington, was in town every day, but was engaged in no business at the time of the killing.

George Cisco, a witness for the defense, testified that while he was standing at a point about 75 steps from the saloon, on the west side of the square, he saw the defendant start from the drug-store in the direction of McNatt's. As he passed the front of deceased's store the latter was standing in the door. After having passed the door, defendant turned with his right hand behind him, and walked up to deceased. The latter struck his hat off with his left hand. Each then struck the other with the left hand. For some time they stood and cursed each other, when the defendant drew his pistol and held it down by his side, and deceased drew his up from his breast pocket, and presently they commenced shooting, but the witness did not know which shot first. During the shooting witness saw smoke boil out from the alley door, as though some one were shooting from there.

Calvin Baker, for the defense, stated that from a point 75 yards S. W. from the saloon, he saw defendant and deceased, quarreling, the former in front of the saloon with his hand behind him and his hat lying some distance off on the ground, and the latter in the saloon door with his hand in his breast. In a few minutes both drew and commenced firing, but witness could not say which fired first. He saw the defendant's hat, after the shooting, with a hole shot through it. Witness did not think that it could have been shot where it lay by either defendant or deceased.

Rube Horton testified for the defense that, a little after dark on the evening before the killing, he was in McNatt's store, where Pat McLaughlin, defendant's brother, was clerking. Some one told Pat that his brother had gone to the saloon with a shot-gun, and Pat went to the saloon to get his brother to go home. Early next morning witness told the deceased that it would be best to "leave the defendant alone;" that if they kept on it would terminate in trouble. Deceased replied that the row had to come, and had as well come then as any time; that when defendant reached town that morning, he was going to see and ask where his shot-gun was, and tell him to go and get it,—that he would bet $20 the defendant would not get it.

Dr. Salmon testified that he was called to see the defendant shortly after the shooting, and found him shot twice; once in the left side, the ball entering from the front and ranging backwards and downwards very near reaching the cavity of the abdomen; the other ball striking square between the shoulders, passing through the over and under-coats at the seams, and lodging without entering the body, but raising a bump.

Davis & Garnett, for the appellant. It is too well settled to require the citation of authorities that the former conviction of murder in the second degree acquitted appellant of murder in the first degree. We first raised the question on the admission of evidence. When the State proposed to travel back for months preceding the homicide and show all the grudges and quarrels that had existed or taken place between the parties, we objected, because such evidence was admissible upon no issue except that of express malice, and that issue had been forever settled against the State; but the objections were overruled.

Upon the former trial the court charged the jury in substance: 1st. That if the homicide was upon preconceived malice it would be murder in the first degree. 2d. If appellant voluntarily entered into mortal combat armed with a deadly weapon, and the design to so enter was formed in his mind when capable of calm, cool and deliberate reflection, the homicide would be murder in the first degree. 3d. That if appellant brought about the difficulty with the intent to kill, the homicide would be murder of the first degree. The jury acquitted appellant of murder in the first degree, and settled all these issues of fact forever against the State. Upon the present trial the court delivers the same charge, submits the same issues, but tells the jury that homicide committed under either of the above three states of fact would be murder in the second degree. If this is not placing a man twice in jeopardy for the same offense, what is it? Suppose that upon the former trial the jury had found the defendant guilty of manslaughter, and thereby acquitted him of both degrees of murder. Suppose that when the defendant was placed upon trial for manslaughter (for he could never afterwards be tried for any higher offense), the court should charge the jury: 1st, that homicide upon express malice is manslaughter; 2d, that if the defendant, armed with a deadly weapon, voluntarily and designedly entered into a mortal combat, and the design to so enter was formed in his mind when capable of calm, cool and deliberate reflection, that the homicide would be manslaughter; 3d, that if the defendant brought about the difficulty with the intent to kill, the homicide would be manslaughter. Suppose that the jury, under the charge, should convict the defendant of manslaughter, would a conviction obtained by these foul slanders upon the law be permitted to stand? If it is error to tell the jury that manslaughter is murder, in order to obtain a wrongful conviction of murder, why should it not be equally erroneous to tell the jury that murder is manslaughter in order to obtain a wrongful conviction of manslaughter? According to the same rule, why is it not as erroneous to tell the jury that murder in the first degree is murder in the second degree, as it is to tell the jury that murder in the second degree is murder in the first degree?

We are well aware that if the indictment had in the first instance been for murder in the second degree, the defendant would not be permitted to say that the facts would have supported one for murder in the first degree. The State has a right to carve in this way, and a conviction or acquittal would be a bar to any other indictment based upon that transaction. But in this case the right of the State to carve out of a transaction a lesser offense than was in fact committed, is not the question. The State did not proceed in that manner, but indicted appellant for murder in the first degree, placed him upon trial, and upon this charge he was acquitted. The question is as to the right of the State to put the defendant twice in jeopardy for the same offense or upon the same issue. We are also aware of the fact that a defendant will not be heard to complain that the jury and the court erred upon the side of mercy, and convicted him of a lower grade of offense than he was in fact guilty of. This is not the question involved in this case. It was not "mercy, dropping as the gentle rain from heaven," that induced these instructions. It looks more like a disposition to deprive appellant of a substantial right by denying him the fruits of his former acquittal, and to twice place him in jeopardy upon the same issues.

In reason and justice, appellant is entitled to the full benefit of the former acquittal of murder in the first degree, and should not be twice placed in jeopardy. And to the end that he should not be deprived of these rights, the evidence should have been confined to the issues arising on murder in the second degree, and the charge should have been confined to murder in the second degree, and should have been a correct exposition of the law of murder in the second degree.

Grigsby & Willis, also for the appellant.

H. Chilton, Assistant Attorney General, and *N. P. Jackson*, for the State.

Hurt, J. The appellant killed E. O. Driscoll on the 15th day of March, A. D. 1879, in the town of Burlington, Montague county. In June following he was indicted by the grand jury of that county on a charge of murder in the first degree. In June, 1880, he was tried and convicted of murder in the second degree. At the December term, 1880, a new trial having been awarded, he was again placed upon trial and convicted of murder in the second degree; from which judgment of conviction he appeals to this court.

There are a number of errors assigned, and reasons urged why the judgment should be reversed; but we deem it unnecessary to consider them all. A proper solution of three points raised by the record, and assigned as error by the defendant, will be all that is required for a correct disposition of this case.

1. Was there error in the charge of the court upon the subject of manslaughter?

2. Did the court err in refusing to give the instructions asked by the defendant, bearing upon the right of self-defense in connection with the conspiracy between deceased and one Freeland?

3. Did the court err in not rejecting evidence of express malice,—the defendant being on trial for murder in the second degree?

1st. On manslaughter, the court below charged the jury:

"Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion, arising from an adequate cause, but neither excused or justified by law. You will see that, to reduce a killing from murder to manslaughter, the mind of the slayer must be under the influence of a sudden passion, arising at the time of the killing, aroused by a present provocation and not the result of a former provocation. It is not enough that the mind is merely agitated by passion arising from a former provocation. The passion must have been aroused by an adequate cause, and the cause must be sufficient to produce a degree of anger, rage, resentment or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are not deemed adequate causes to reduce a killing from murder to manslaughter."

The only other reference to the subject of manslaughter, except when mentioned in connection with the definition of murder in the second degree, is as follows:

"If you find from the testimony that the defendant did so shoot and kill the said Driscoll at Montague county, at any time within three years before the 23d day of June, 1879, and if there is in your mind a reasonable doubt as to whether said killing was with malice aforethought or not, then you will acquit defendant of the charge of murder. But if you find that said killing was not in his, defendant's, own proper self-defense, as hereinbefore defined, then you will find defendant guilty of manslaughter."

The evidence being of such a character as to require a charge upon manslaughter, the question presents itself: is the above charge such as the law requires? The counsel for defense objects, and we think justly, to this charge: 1st, upon the ground that it is negative in its nature and effect; 2d, that, though it is true that insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are not deemed adequate causes to reduce a killing from murder to manslaughter, yet, this being true as an abstract proposition of law, the facts of this case do not justify the court below in stopping with the enunciation of this principle.

We search in vain to discover in this charge an affirmative, direct and pertinent application of the law of manslaughter to the facts of the case. Though the charge contains correct abstract propositions of the law of manslaughter, there is not the slightest attempt to apply affirmatively these principles to the evidence. Manslaughter is a defense to murder, as well as self-defense,—the former partial, while the latter is complete. The rule applicable to all defenses, whether complete or otherwise, is that the court below must apply the law clearly, pertinently, and *affirmatively* to the facts tending to support the defense. *Johnson* v. *State*, 43 Texas, 612.

The charge presenting manslaughter negatively, the impression is natural that, in the opinion of the judge presiding, the evidence fails to support this degree of homicide. The effect of such a charge is to impress upon the minds of the jury that the presiding judge has but little if any confidence in the evidence tending to support manslaughter. If the evidence made it necessary to charge upon manslaughter,—and we think it did,—the law should have been given to the jury affirmatively, and not burdened—freighted down—with negatives. And as Judge Ireland, in *Johnson* v. *State*, above cited, very properly suggests: "After giving the law as was done in this case, the judge should have given a distinct, independent charge on manslaughter, telling the jury in a proper form that if they find from the testimony that the circumstances did exist which would reduce the offense to manslaughter, they could only find him guilty of that offense." *Johnson* v. *State*, 43 Texas, 612.

The second objection to the charge on manslaughter is that, whilst it is true that insulting words or gestures, or an assault and battery so slight as to show no intention to *inflict pain* or *injury*, are not adequate causes, the evidence presents no such restricted issue. As a legal proposition this is correct, but these legal propositions given abstractly will not suffice. They must be applied by the court to the facts, directly, clearly, and affirmatively. Suppose there are other facts to support the theory of manslaughter besides insulting words or an assault and battery so slight as to show no intention to inflict pain or injury, would it be proper for the court to call special attention to the insufficiency of the insulting words and assault and battery, and remain silent as the grave upon the other facts? We think not. This would be giving undue prominence to a legal fact hostile to the defense, after first separating it from its immediate neighbors, the other facts which tend to support the defense. If proper to inform the jury of the *facts* which will not reduce, certainly it was the duty of the court to instruct them as to *those* which would reduce the offense to manslaughter.

But again, suppose the assault and battery was so slight as to show no intent to inflict pain or injury, viewed separate and independent of the facts which surrounded it, yet when viewed in the light of the surrounding facts — taking the assault and battery with all of the other facts,— not only an intent to inflict pain or injury, but a deadly intent, appears, would it be proper or just to the defendant for the court to single out the facts which would not be sufficient to reduce the offense and remain silent in regard to those which would? Most clearly not.

We are not to be understood as holding that defendant is not guilty of murder or that he is guilty of manslaughter. We are treating of the charge of the court, and not the guilt or innocence of the defendant. Every theory presented by evidence in the case demands of the court a charge thereon, whether strongly or weakly supported by the testimony. If there be evidence tending to support it, the law must be directly and pertinently applied thereto. The jury, and the jury alone, must pass upon the strength of the evidence which tends to support the theory. Nor can the evidence be so full and complete in favor of one theory, as to preclude evidence, or excuse the court in refusing or failing to charge the law, relative to another theory.

The statement of facts tends to establish a conspiracy between deceased and one Freeland. Freeland was present, armed, and there is evidence tending to show that he fired at if he did not shoot the defendant. Under this state of facts, the counsel for defendant asked these instructions:

"If you believe from the evidence that a conspiracy was entered into between Driscoll (the deceased) and Freeland, to kill the defendant, and that defendant was stopped by Driscoll, and that it was the intention of Driscoll and Freeland, or either of them, to kill the defendant, and that they were then about to execute said conspiracy, you will find the defendant not guilty."

By reference to the charge of the court upon the subject of self-defense it will be seen that the defendant's right to defend himself is made to depend upon the acts or demonstrations of Driscoll alone. This is the case connected or disconnected with threats. Here the charge of the court did not apply the law applicable to all of the facts of the case, for if there was a conspiracy between Driscoll and Freeland to take the life of the defendant, and Freeland was present, any act on his part showing an intention to consummate the conspiracy would have justified defendant in acting in his own protection. And if it reasonably appeared to him by all of the surrounding facts that Driscoll and Freeland were there acting together, he had the right to take the life of either. Whether the charge asked was precisely correct or not, the facts were of such a character that this rejected charge sufficiently called the attention of the court to the subject, and, if not correct, the proper charge should have been given upon that phase of the case. We are of the opinion that, whether asked or not, it was the duty of the court to have charged the law applicable to this state of facts. Nor was it necessary to show that the defendant knew of the conspiracy. If the evidence shows the conspiracy (and of this there is no doubt), and that Freeland was present, the defendant may have known of it, or he may have seen the conduct of Freeland, as did the witnesses who were present. This was a matter for the jury. If they believed from the evidence that defendant knew nothing of the conspiracy, nor see any act of Freeland showing the conspiracy, and the intention then to carry into execution the conspiracy to take the life of the defendant, of course the fact of conspiracy would have no bearing upon the case. This fact could have been presented to the jury along with the charge upon that subject.

The third question, and the last which we will consider, is the action of the court in receiving evidence of express malice, over the objection of defendant. The defendant having been acquitted of murder of the first degree by a verdict of murder of the second degree, and being placed upon trial again for murder of the second degree, the defendant objected to all evidence tending to show express malice. This objection we think was not well taken. The difference between express and implied malice is that the former must be shown by evidence, nor can it (express malice) be inferred from the killing alone; while the latter is presumed from the killing with a deadly weapon if not attended with circumstances which reduce to manslaughter, or which excuse or justify the killing. It is logically impossible to prove express malice without proving malice, and if the killing be upon malice the offense is murder. In order, however, to convict of murder in the first degree, the malice must be affirmatively shown by the evidence.

Again, under an indictment for murder of the second degree, issues are formed upon manslaughter and justifiable or excusable homicide. Evidence, therefore, of express malice is evidently admissible upon those issues. For if the killing be upon express malice, the offense cannot be manslaughter or justifiable homicide. The court did not err in overruling the objection to the admissibility of this character of evidence.

For the errors of the court above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

JAMES ELLISTON v. THE STATE.

1. **CHARGE OF THE COURT.**—It is made the imperative duty of the court in felony cases, to charge the law and all of the law applicable to every conclusion which may be legitimately deduced from the evidence.

2. **SAME.**—Though it was the duty of the accused to ask an appropriate instruction, his failure to do so will not preclude a reversal by this

court when it appears that the omitted instruction was law applicable to some of the facts in proof, and that its omission was prejudicial to the rights of the accused.

3. Same — Negligent Homicide.— See the opinion and the facts for a state of proof which in a trial for murder makes the law of negligent homicide a part of the law applicable to the case.
4. Murder in the Second Degree.— A conviction for murder in the second degree will not be set aside because the proof tended to show that the killing was upon express malice aforethought.

Appeal from the District Court of Tarrant. Tried below before the Hon. A. J. Hood.

The indictment charged the murder of David Boaz. The appellant was found guilty of murder in the second degree, and his punishment assessed at confinement in the penitentiary for the term of five years.

The opinion discloses the material facts.

E. Hovenkamp and *H. M. Furman*, for the appellant. The third assignment of error complains of the action of the court in not charging the law of negligent homicide. No matter how vague the evidence tending to establish this conclusion may have been, nor how improbable it might have been that the jury would make that deduction, yet, if it was a possible legitimate deduction, the court should not have withdrawn that issue from their consideration by failing to include it in his charge, and this omission will not pass unnoticed, even though no instruction be asked on that point. *Smith* v. *State*, 7 Texas Ct. App. 383, and authorities there cited. The failure of the court to give charge upon this issue withdrew it from the consideration of the jury, and if there was any evidence, "no matter how vague," tending to establish this conclusion, the charge should have been given, whether asked or not. We respectfully submit that the failure of the court to give instructions applicable to every legitimate deduction that may be drawn from the evidence, is, and of necessity must be, calculated to injure the rights of the defendant, and is error, whether or not excepted to, or additional instructions asked. *Vincent* v. *State*, 9 Texas Ct. App. 303; also art. 677, Code Crim. Proc., which makes it the duty of the court to "distinctly set forth the law applicable to the case," "whether asked or not." Can it be said that the court has "distinctly set forth the law applicable to the case," when the charge entirely ignores a deduction that may be legitimately drawn from the evidence? We respectfully submit not.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was tried and convicted of murder in the second degree, and his punishment assessed at seven years' confinement in the State penitentiary, on an indictment charging him with the murder of one David Boaz, averred to have been committed in the county of Tarrant on December 29, 1880.

It is shown by the testimony, as set out in the statement of facts, that on the night of the homicide the defendant and others were engaged in playing cards in a room of an unoccupied house which stands near a drinking saloon belonging to the deceased; that, during the time the parties were thus engaged, the defendant went from the room where the card-playing was going on into the drinking saloon, for the purpose of procuring spirits, whiskey it seems, for himself and the other players, and returned with the whiskey, and soon afterwards went out for firewood to replenish the fire in the room occupied by the players, returned with the firewood, and the game was continued for a time,—the defendant participating in the game. In the mean time the deceased, who it seems was about the saloon, disappeared, and a brother of his, who seems to have been attending in the saloon, becoming uneasy on his account, the deceased being at the time nearly blind, and fearing, as he says, that he had got lost, went in search of him; he went to a window in the room where the card players were and inquired for him and was informed that he was not there. Pursuing the search, the brother went to a privy some thirty or forty feet in rear of the other buildings mentioned, where he found the deceased lying on the ground, dead. It was ascertained that the clothes of the deceased indicated that he had been to stool; his pants were down. On examination it was ascertained that he had been shot, the ball entering the left side of the chest near the collar bone, and coming out on the right side of the back in the region of the lower ribs. This shot, witness says, caused the death of the deceased.

It is not necessary to trace the evidence through a chain of circumstances by which the prosecution sought to fasten the homicide upon the defendant; suffice it to say that the testimony was entirely circumstantial. It was proved that the defendant had a pistol, but no witness saw him discharge it; no one saw the deceased shot, or knew it had been done until his dead body was found at the privy as stated above. There was proof that a shot was heard in the vicinity about the time the defendant was going for the whiskey or the firewood, but no witness seems to have known who fired it. Before the body was found the defendant had retired, and did not return to the body after the finding and alarm, though the male citizens of the village generally went to the place on that night after the body had been found. There was proof that it was not unusual to hear pistol-shooting about the village at night, though there was no proof that more than one shot was heard on the night of the killing. There seems to have been an effort on the part of the prosecution to show motive actuating the defendant to do the deed, and there was some evidence of a former disagreement between the deceased and the defendant; but the evidence tends to show that this had passed away and that the parties were together and apparently friendly on the day on which the killing occurred at night.

The judge who presided at the trial below in his charge gave to the jury the statutory definition of murder, and the distinguishing features by which murder is distinguished from every other species of homicide, substantially as laid down in the Code. He instructed the jury as to murder of the first degree and of the second degree, and express and implied malice, and gave an appropriate instruction on the rules of law governing a case when a conviction depends alone upon circumstantial testimony. But he gave the jury no instruction on the subject of negligent homicide. It is urged on behalf of the appellant that the failure of the court to charge on negligent homicide was an error prejudicial to the rights of the defendant. Acting on this idea the defendant made the following one of the grounds of his motion for a new trial, to wit: "Because the court erred in not charging the jury on the law of negligent homicide;" and, among other things, it is assigned as error that the court erred in not charging the law of negligent homicide.

A plain direction of the Code of Procedure is that in all cases of felony it is required of the judge presiding to instruct the jury charged with the case, in writing, and in this written charge he is required to distinctly set forth the law applicable to the particular case then on trial. This demand of the law is imperative. The language of the Code is, "This charge shall be given in all cases of felony, whether asked or not." Code Crim. Proc. art. 677. It is the province and duty of the judge to determine from the evidence what questions arise concerning which the jury should be instructed. The subjects upon which the jury should be charged are determinable by the evidence as developed on the trial,—by the testimony adduced on the particular trial. The provisions of the article of the Code above referred to which requires the court *to distinctly set forth the law applicable to the case* has been uniformly construed to require of the judge to give to the jury such instructions as are applicable to every legitimate deduction which may be drawn from the facts in evidence. When this has been done in appropriate language, adapted to the comprehension of the jury, and the charge at the same time abstains from trenching on the peculiar province of the jury in determining what facts have been proved,— in other words, if the charge is not upon the weight of the evidence and does not sum up the testimony,— in such a case the demands of the law are said to be satisfied. Whilst this position must be regarded as settled law, the converse of the proposition is believed to be equally as well settled, that, when the court has failed to give the jury appropriate instructions upon every legitimate deduction the jury may draw from the facts, in such a case the court has failed to charge the law and *all* the law applicable to the case. (See numerous adjudicated cases cited in Clark's Crim. Law, p. 515, note 204.)

It seems to have been held, prior to the adoption of the Texas Codes, that the mere omission on the part of the judge to give full instructions, even in a felony case, was not such an error as would warrant a reversal on appeal, and there are cases decided even since the adoption of the Codes which tend in the same direction. *O'Connel* v. *State*, 18 Texas, 343; *Greenwood* v. *State*, 35 Texas, 587; *Gilman* v. *State*, 36 Texas, 334. But the law is now well settled to the contrary, and requires that in all felony cases the court must charge the law and all the law applicable to the case.

It is not our intention to express any opinion as to what the evidence tends to prove, or fails to prove, nor do we express any opinion as to what the verdict would have been had the court given the omitted instruction. We are of opinion, however, that from the peculiar circumstances attending the trial, as developed by the testimony, that the question of negligent homicide fairly and naturally arose out of the testimony adduced, to an extent sufficient to require of the court a suitable instruction on that grade of offense. Counsel for the defendant should have requested the court to give the jury an appropriate charge on the subject at the time of the trial. His failure to do so, however, does not entirely deprive the defendant of the benefit of the defect in the charge.

The attention of the court having been first called to the omission in the charge of the court, in the motion for a new trial, it became necessary, in order to warrant a reversal of the judgment, not only to determine that there was a failure to charge the entire law applicable to the case, but also that such failure was prejudicial to the rights of the defendant. *Bishop* v. *State*, 43 Texas, 390.

Upon the whole case as presented in the record before us, we are of opinion that the court should have submitted to the jury for their determination not only the question whether the defendant took the life of the deceased, but also the further question,— the first being answered in the affirmative,— whether or not the killing was done with malice or not, or, what amounts to the same thing, whether the killing was the result of negligence on the part of the defendant. We are of opinion that the omission of the court to submit the issue of negligent homicide to the jury was an error prejudicial to the rights of the defendant, and that because of this error the judgment should be reversed and the case remanded for a new trial.

It is urged in behalf of the defendant that the court erred in its charge in defining implied malice, the objection being to the effect that the charge virtually instructed the jury that what is denominated express malice would support a conviction for murder in the second degree. In response to this argument we only deem it necessary to say that in our opinion the objection, if true, would not be an error of which the defendant can be heard to complain. If the proof shows a killing upon malice aforethought, a conviction of murder in the second degree should not be set aside on the ground that there was proof of express malice, and tending to establish murder in the first degree.

Because of error in the charge of the court, as set out above, the judgment will be reversed and the case remanded.

Reversed and remanded.

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AL. BRITE *v.* THE STATE.

1. **PRACTICE.**— A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it and thereby discredit his testimony.
2. **SAME.**— The law does not sanction an unnecessary inquiry into the antecedents of a witness, for the purposes of impeachment.
3. **SAME — NEW TRIAL.**— See the opinion for a summary of evidence so meager as to demand the granting of a new trial in a case of hog-theft.

APPEAL from the County Court of Caldwell. Tried below before the Hon. J. D. RICE, County Judge.

The opinion discloses the case.

Stringfellow & McNeil, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. "As to cross-examination of witnesses for the prosecution, the rule laid down by Mr. Greenleaf is that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it, and thereby discredit his testimony. 1 Greenl. Ev. sec. 449." *Stevens* v. *State,* 7 Texas Ct. App. 39. Nor for purposes of impeachment does the law sanction an unnecessary inquiry into the antecedents of a witness. *Handline* v. *State,* 6 Texas Ct. App. 348.

Other supposed errors are insisted upon in the assignment and in the brief of counsel, which we do not consider it necessary to discuss, in view of the conclusion we have arrived at as to the proper disposition to be made of the case as presented on this appeal. We are not satisfied of the character, conclusiveness and sufficiency of the evidence upon which the judgment is based. In proof of his ownership and the identity of the animal, the principal prosecuting witness testified: "When I found the sow at defendant's smoke-house it had been scalded and cleaned and gutted. I knew it was my sow from the fact that there were some black hairs on the head. There was nothing about the animal when found by me by which I could tell that it was a sow, but God knows it was a sow, and I know it."

Henry McMahon, another main witness for the prosecution, on cross-examination said: "When I went to defendant's I went on horse back. Can't say how close I went to the sow. It may have been two steps and it may have been ten steps. When I saw the sow, I don't know whether she was lying on her belly or on her back; but I don't think she was lying on either of these places. I don't know which end of her was toward me. I know it was a sow, and God knows it was a sow. I have never seen that sow since." The remaining State's witness testified, "when I got there I found a hog out by his smoke-house, but it was cleaned and gutted. I could not tell whether it was a sow or not, nor could

I tell whether or not it was the hog of Isaac Hubbard. I saw a hog's head in the back end of the smoke-house, both ears of which were cut off."

In behalf of defendant, besides three of his own family, a white man testified that the animal killed was in his, the defendant's, mark. In addition, the defendant established his character for honesty, by white witnesses who had known him for years. The court erred in refusing a new trial, in consideration of the meagerness and insufficiency of the evidence; wherefore the judgment is reversed and the cause remanded.

Reversed and remanded.

WILLIAM H. DODD *v.* THE STATE.

1. PRACTICE — INDICTMENT. — Objections to an indictment based upon erasures or interlineations can be reached under our Code only by exceptions to the form. Such exceptions should be framed for the want of any of the requisites or forms prescribed by article 420 of the Code of Criminal Procedure, subdivisions 2 and 3.
2. SAME. — If the interlineations were made after the indictment was presented by the grand jury, it would appear that such indictment was not presented in the District Court by, and was not in fact the act of a grand jury, and such exceptions could be taken only under the subdivisions quoted. But if by reason of interlineations and erasures admitted to have been made by the grand jury the objection could be maintained that the offense was not set forth in plain and intelligible language, such exception could also be reached under subdivision 7 of article 420.
3. SAME. — The Code of this State allows no such plea to an indictment as a plea in abatement. See the opinion *in extenso* for a discussion of pleas to indictments.
4. SAME. — The court and not the jury is to decide what are the words of an indictment or other pleading. If there is doubt which of two words is meant, the sensible rendering will be accepted. Bad handwriting, if legible, is not ground of legal objection. Erasures and interlineations will not necessarily render the pleading bad.
5. SAME. — BURDEN OF PROOF is on the defendant to show by irresistible proof that the erasures and interlineations were not the act of the grand jury.

6. INDICTMENT — POSSESSION AND OWNERSHIP — CASE STATED.— It was urged below that the indictment was fatally defective in that it alleged the possession of the animal stolen in one person, viz.: "Richard Godfrey M. D. Chastain," and at the same time avers that it was "the property of said Godfrey and M. D. Chastain without the consent of the owner or either of them." The position that the omission of the conjunctive "and" between "Richard Godfrey" and "M. D. Chastain," in the allegation of possession, makes them but one person in law, is untenable in view of the fact that the indictment further refers to the owners as "said Godfrey *and* M. D. Chastain," and the omission of the conjunction in the allegation of possession could not have misled the jury.

7. EVIDENCE — THEFT OF ANIMALS.— To sustain an accusation of theft of animals, ownership can be proved independent of a bill of sale; and exclusive possession, care, management and control of such property is sufficient proof of ownership.

APPEAL from the District Court of Menard. Tried below before the Hon. W. A. BLACKBURN.

The indictment charged the theft of a cow, and the punishment assessed by a verdict of guilty was a term of two years in the penitentiary.

On the part of the State it was testified that the appellant, in February, 1876, on the highway in Menard county, butchered a large red cow branded Z. The time of the act was shown partly by direct testimony, and partly by showing that it was done in the month succeeding that in which one Bolls was killed, which was shown to have been in January, 1876. Ownership, care and control of the brand, and that they gave no consent to the appellant to kill or appropriate any of that brand, was testified to by Godfrey and Chastain, in whom the property was alleged in the indictment.

On behalf of the appellant it was testified by his wife that he was in Brown county, and not in Menard county, in February, 1876; that he left Menard county in December, 1875, and had not since been back. She further testified that early in 1875 she bought a two-year-old red heifer from John Jackson, branded Z. Jackson testified that at one time he traded either to the appellant or his wife a cow and heifer calf. The cow was branded R. J., but the calf was neither marked nor branded so long as the witness knew anything of it.

W. A. H. Miller and *John Dowell*, for the appellant.

J. H. McLeary, Attorney General, for the State.

WHITE, P. J. We know of no other mode by which objections to an indictment on account of erasures or interlineations can be urged under our Code of Procedure than by exceptions to the form of the indictment. Code Crim. Proc. art. 488. Such exceptions are permitted for the want of any requisite or form prescribed by art. 420. Under art. 420 we imagine that such exception might be based upon subdivisions two or three, which provide with regard to the sufficiency of the indictment that "it must appear therefrom that the same was presented in the District Court of the county where the grand jury is in session," and "it must appear to be the act of a grand jury of the proper county." If the interlineations or erasures were made after the indictment was presented by the grand jury, then indeed it might well be claimed that such indictment was not presented in the District Court by, and was not in fact the act of a grand jury. If, by reason of erasures and interlineations admitted to be made by the grand jury, the objection could be maintained that the offense was not set forth in plain and intelligible words, exception based upon that ground might also be reached under subdivision 7 of art. 420. It is manifest from the Code of Procedure itself that objections of such character are not and do not come within either the designation or purview of motions to set aside indictments (Code Crim. Proc. art. 523), nor of the special pleas which are the only ones which can be made and heard for a defendant. Code Crim. Proc. art. 525. Under this latter article only two special pleas are mentioned, 1st, former conviction, and 2d, former acquittal; none others are known and recognized by express provision. These are the special pleas which must be verified by affidavit, and all issues of fact presented by them must be tried by a jury. Code Crim. Proc. arts. 526, 527.

In the case we are considering the erasures and interlineations urged against the validity of the indictment are presented in what appellant's counsel denominates a plea in abatement, which plea they also claim was a special plea, and if a special plea that then it raised a question of fact which should have been tried by the jury, and not, as was done in this instance, by the judge alone. The plea was not a special plea, because, as we have seen, no such special plea is provided for or allowed by law. If not a special plea, then the question of fact was not one which the law required should be submitted to the jury, and consequently could be tried and determined by the court. Though called a plea in abatement, the objection was in fact, and could only be treated as an exception to the validity of the indictment; and the question, and only question, raised by the exception was — not whether there were interlineations and erasures — but whether they were made before or after the indictment was returned by the grand jury. If made before, and the language of the indictment, with the erasures and interlineations, was still plain and intelligible, the exception would be worthless, and should, as we shall hereafter see, have been overruled, as was done in this case. As declared by Mr. Bishop, the rule is, "The court and not the jury is to decide what are the words of an indictment or other pleading. If there is doubt which of two words is meant, the sensible rendering will be accepted. Bad handwriting, if legible, is not ground of legal objection. Erasures and interlineations will not necessarily render it bad." 1 Bish. Crim. Proc. (3d ed.) sec. 338.

In *State* v. *Florez,* the Supreme Court of Louisiana upon a similar question say, "it is alleged that the indictment has upon its face 'alterations, interlineations, and interpolations made in a different handwriting from the body of the indictment, and not expressly authorized or noted in any manner by the grand jury; and that the grand jury alone have power to amend or authorize an amendment to their indictment?' It is no doubt proper and commendable in all officers of the State to present the public documents emanating from them in a fair hand, without erasures or interlineations. But in this case we have no doubt from the testimony that the indictment appears on record *verbatim et literatim* as it was presented by the attorney general and found by the grand jury; and we would take this for granted without statement or proof on behalf of the State until the defendant should establish the contrary by irresistible proof." 5 La. Ann. 429.

To the same effect it was held in *French* v. *State,* 12 Ind. 670, that "if an indictment is conveniently legible it will not be held bad because it contains interlineations, and in the absence of anything appearing upon the face of a written instrument, or being shown extrinsically, tending to prove that interlineations were made subsequently to its execution, it will be presumed that they were made before or at its execution."

And in *May* v. *State,* 14 Ohio, 461, it was held that "a letter added to a word in an indictment in pencil mark before the indictment is found by the grand jury does not vitiate the indictment." And so also in the *Comm.* v. *Fagan,* 15 Gray's (Mass.) R. 194, the court hold that "erasures and interlineations in an indictment, without any note or certificate to show when or by whom they were made, afford no ground of arresting judgment."

Now, though our statute provides that an indictment shall be prepared by the attorney representing the State, and shall be delivered to the foreman of the grand jury for signature (Code Crim. Proc. art. 413), we apprehend that it was never intended that the foreman should sign an indictment not found by the grand jury, nor that the grand jury could not correct any mistake made by the attorney in preparing said bill, so as to make it conform to their findings. Because "an indictment is the written statement of a grand jury (not of the attorney representing the State), accusing a person therein named of some act or omission which by law is declared to be an offense." Code Crim. Proc. art. 419. If the attorney representing the State has committed a mistake in preparing the instrument, with regard to proper parties, necessary dates or particular facts, it would not only be the right but the duty of the grand jury, when their attention was called thereto, to correct such mistakes, because their oath of office requires of them that "they shall present things truly as they come to their knowledge." Code Crim. Proc. art. 384.

Whilst it is true the district attorney in this instance swears the interlineations and erasures in the indictment we are considering were made after he had prepared the same, and were not in his handwriting, he does not say, nor does any witness attempt to prove, that they were made after the indictment was returned to and filed in court by the grand jury, nor that they were not the act of the grand jury themselves, done and made before such return and filing. That they were not the act of the grand jury and done before the return and filing, it was the duty and burden of the defendant to show and establish by irresistible proof. This was not done to the satisfaction of the court below, and we are of opinion the ruling of the court was correct,—the evidence failing to show any ground of suspicion even that the grand jury had not, as was their right, made the changes complained of, to conform to their findings.

But it is earnestly contended that the indictment is fatally defective in that it alleges the possession to have been in one person, viz.: Richard Godfrey M. D. Chastain, and at the same time avers that it was "the property of said Godfrey and M. D. Chastain, without the consent of the owner or either of them." The position is that the want of the conjunctive "*and*" between Godfrey and M. D. Chastain in the allegation of possession makes them but one person in law. *State* v. *Toney*, 13 Texas, 74. This objection is hypercritical when we read the whole count and find the owners referred to as "said Godfrey *and* M. D. Chastain." There was but one count in the indictment, and no one could be misled as to its meaning, or the number of names and individuals used and mentioned in it, when read as an entirety. In Toney's case there was nothing in the indictment to indicate that "Edward Toney Joseph Scott" was not one single individual. The two cases are not analogous. We are of opinion, as is remarked by the attorney general in his brief, that "the indictment, though not elegant in appearance or artistic in form, contains all the essential elements of a good pleading."

There was no error in refusing to exclude the parol evidence of ownership after such evidence disclosed an ownership claimed and held under a written bill of sale. To sustain an accusation of theft of animals, ownership can be proven independent of a bill of sale, and exclusive possession, care, management and control of such property is sufficient proof of ownership. *Crockett* v. *State*, 5 Texas Ct. App. 527; *Turner* v. *State*, 7 Texas Ct. App. 396; *Pippin* v. *State*, 9 Texas Ct. App. 269; *Alexander* v. *State*, 9 Texas Ct. App. 48.

It only remains for us to say, with regard to the charge of the court, that the objections urged to it are not tenable; it was a fair and full exposition of the law. With regard to the evidence, suffice it to say that in our opinion it is amply sufficient to support the verdict and judgment. There is no error for which the judgment should be reversed, and it is therefore affirmed.

Affirmed.

R. T. WHITNEY v. THE STATE.

1. **GAMING.**—The appellant was prosecuted under an indictment charging that he did "unlawfully keep and exhibit a gaming table for the purpose of gaming." The evidence disclosed that the appellant was the proprietor of a saloon, and kept in his saloon a table upon which the game of dice was thrown for drinks and money, and upon which the game of dominoes was played. *Held*, that the tables denounced by arts. 358, 359, 360 of the Penal Code are such tables only as are constructed for the playing of certain specific inhibited games, in which the table is not only a part of the gaming device, but is also essential to the proper playing of the game. See the opinion *in extenso* for the question discussed.
2. **SAME.**—Prior to the act of March 5th, 1881, amendatory of arts. 364 and 365 of the Penal Code, and which took effect ninety days after its passage, the throwing of dice was not *per se* in violation of any law of this State. See the opinion for the substance of the amendment.

APPEAL from the District Court of Erath. Tried below before the Hon. T. L. NUGENT.

The penalty imposed by a verdict of guilty was a fine of $25. The opinion discloses the entire case.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. In this case the charge in the indictment was that defendant did "unlawfully keep and exhibit a gaming table for the purpose of gaming." Only one witness testified. He said, "I know the defendant; he keeps a saloon in the town of Stephensville, Erath county, Texas. About the 1st of December, 1880, the defendant, and for a long time before that time, had in his saloon a table upon which I saw the defendant and some other persons throw dice. I have seen dice thrown there a great many times for the drinks, and I have seen persons throw there for money. I have thrown dice on the table myself, and have seen others do the same; and also on the counter. I have thrown dice with the defendant for the drinks on that table. The table was sometimes used for playing the game of dominoes. There was kept on the table a leather box and five dice, and the game of dice was played this way: each one would throw and the person throwing the lowest hand would pay for the drinks. When they were throwing for money, each person would put his money on the table, and the person throwing the highest hand would take the whole amount. The dice box, dice and table were owned by the defendant."

We are of opinion the game here described does not come within the provisions of arts. 358, 359 and 360, Penal Code, with regard to keeping or exhibiting tables for gaming purposes. Article 359 expressly declares the character and description of the inhibited tables or banks, "to include every species of gaming device known by the name of table or bank of every kind whatever," and that this statutory provision "shall be construed to include any and all games which in common language are said to be *played, dealt, kept, or exhibited.*" Obviously the intention was to prohibit gaming upon tables or banks made or constructed with a view to certain specific games, in which the table or bank is not only part of the gaming device, but is also necessary to the proper playing of the game. In other words, the table or bank is an essential to the game, and from its peculiar construction and the manner in which it is operated, forms part of the game. This seems clearly to be the proper meaning of the words "table" and "bank" as used in articles 358 and 359.

In article 360 certain other games are specially enumerated as coming within the meaning and intention of these articles, but their enumeration, it is declared, "shall not exclude any other properly coming within the meaning of the two preceding articles." Now, does throwing dice upon a common table, constructed in no manner with any peculiar reference to any particular game, come within the meaning of bank or gaming table, even though used principally for throwing dice upon? And does throwing dice *per se* come within the prohibited games mentioned in these articles? We think not. The table is not a part of nor essential to the game; for (if a game) the dice can be thrown as well upon the counter, upon a blanket spread upon the floor, upon a smooth surface of the ground it may be, as upon that table. If the table itself is not a gaming device or bank, then it cuts no figure in the game; it cannot be said to be *played, dealt, kept, or exhibited* for gaming purposes.

If the table upon which dice are thrown does not come within the prohibited tables or banks, it follows that throwing dice upon it is not within the statute, because it is not so expressly enumerated with other games in art. 360. "The words 'played' and 'dealt' have the meaning attached to them in common language. The word 'exhibited' is intended to signify the act of displaying the bank or game for the purpose of obtaining bettors." Penal Code, art. 363.

It is true that in some sections of the State the extent to which this evil is carried of throwing dice for money or drinks in saloons for retailing spirituous liquors has become a nuisance in society, and a crying shame to our civilization, besides being the fruitful source of disturbances of the peace and in many instances of bloodshed and murder. Happily our law-givers have appreciated the defects of our statutes in this respect, and, to counteract the evil, at the last session of the Legislature passed an act which it is to be hoped will apply a remedy and suppress the mischief. By act approved March the 5th, 1881, and which takes effect ninety days after adjournment, that body passed an amendment to articles 364 and 365 of the Penal Code, which amendment provides: "If any person shall bet or wager * * * money or anything of value * * * at any of the following games, viz., poker dice, jack pot, high dice, low dice, low die, dominoes, euchre with dominoes, poker with dominoes, sett with dominoes, muggins, crack-loo, crack or loo, or at any game of any character whatever which can be played with dice or dominoes, or on any table, bank, or alley by whatsoever name the same may be known, and without reference to how the same may be constructed or operated, he shall be fined not less than ten dollars nor more than twenty-five dollars; *provided*, no person shall be indicted under this section for playing any of said games with dice or dominoes at a private residence." "Art. 365. If any person shall permit any game prohibited by the provisions of this chapter to be played in his house or a house under his control, or upon his premises or upon premises under his control,. the said house being a public place, or the said premises being appurtenances to a public place, he shall be fined not less than twenty-five nor more than one hundred dollars." Gen. Laws, 17th Legislature, ch. XXV, p. 17.

In the case before us the indictment, though a good one, is not supported by the evidence that dice were thrown upon a common table. At the time the offense is alleged to have been committed, gambling under such circumstances came within none of the rules pertaining to games which were *played*, *dealt*, *kept*, *or exhibited* for gaming purposes; and because the evidence does not support the charge in the indictment, the judgment is reversed and the cause remanded.

Reversed and remanded.

MANDA WHITE *v.* THE STATE.

1. PRACTICE.— However reprehensible as a question of practice may be a ruling of the court in a dispute over privilege of counsel in argument, if such ruling inures to the benefit of the defendant, he cannot be heard to complain.
2. SAME.— But, on the other hand, if the argument addressed by counsel to the court upon a disputed question of law, is resorted to merely for the purpose of inflaming the passions of the jury, it is the duty of the court to interfere by peremptory order.
3. SAME.— Whenever a question as to the admissibility of evidence is to be discussed alone before the judge, the jury should be retired for the time. See this case for example.
4. PRACTICE IN THIS COURT.— This court will not revise the action of trial courts with reference to matters confided to their sound discretion, unless prejudice to the defendant is shown to have resulted from an abuse of such discretion.
5. EVIDENCE — IMPEACHMENT OF WITNESS.— The ancient rule that a party cannot impeach his own witness is so far modified in this State as that a party may attack the testimony of the witness in any manner except by proving his bad character. See the opinion *in extenso* for an elaborate discussion of the question.
6. SAME.— When a State's witness on a former trial has made statements contrary to those made on the trial pending, the State's counsel is authorized to interrogate the witness respecting such former different or contradictory statements.
7. CHARGE OF THE COURT.— Refusal of an instruction which directs the attention of the court to a proper issue, with proper modifications demanded by the case as made by the evidence, is error. See this case for example.
8. EVIDENCE.— See evidence held insufficient to support a conviction of murder in the second degree.

APPEAL from the District Court of Cooke. Tried below before the Hon. H. E. ELDRIDGE, Special Judge.

The appellant was indicted, with Charles Reed, for the murder of Frank White. The verdict against her was for murder in the second degree, with punishment assessed at five years' confinement in the State penitentiary. The parties and most of the witnesses were colored people.

Henry Bartee, colored, was the first witness introduced by the State. He testified in substance that he lived in Gainesville, occupying a house about fifty yards from that in which the deceased was killed. The witness had gone to bed, but was not asleep, when he heard three reports of fire arms. He got up, dressed, went out, and saw Reed running from the direction of the house in which the shots were fired. The witness proceeded to the house, found the deceased lying on the floor, dead; Jake Murrell and the defendant were present, the latter kneeling and holding the dead man's head in her lap. The deceased had on a blue overcoat, hat, pants and boots. The witness was of the impression that the defendant was dressed—she was halloaing and crying. There was a light in the room, and two beds; one spread on the floor, and the other on the bed-stead. When the witness saw Reed running from the house, the latter was in his shirt-sleeves, and had something across his arm, which witness took to be a coat. The deceased and the defendant were married, but did not live together at the time of the killing. Reed lived at the defendant's house, and he and defendant lived as man and wife. The witness saw the deceased and Reed together the night of the killing, near Hall's stable, going towards home. They were quarreling.

The cross-examination of the witness developed nothing material to the case. He had never seen the defendant and Reed in bed together, and only presumed they lived as man and wife because Reed stayed at the defendant's house.

Jake Murrell testified, for the State, that he lived near the defendant's house. On the night of the killing, he had been asleep, and was awakened by the shooting. He got out of bed and ran out of his house, and heard the defendant screaming. He then ran to her house and found the door standing partly ajar. The deceased was lying on the floor with his head towards the door. The defendant was down by him, screaming and crying, and holding his head in her lap. The witness asked her three different times, "what is the matter?" but got no reply. He then asked her two or three times, "who did that?" She finally replied: "Charley Reed did it." The witness took the light and looked at the corpse. This brought him close to defendant and he looked into her face, but discovered no traces of tears.

Cross-examined this witness said that when he reached the house, the defendant had on white night clothes, and nothing else. The deceased had on a blue overcoat. The witness did not notice his other clothing. Some of the bed clothes on the pallet were on fire when the witness reached the house.

Maggie Moore was introduced by the State and testified that the defendant was at her house one or two evenings before the homicide. To the question "if the defendant did not tell her that she was going to have Frank White killed if it cost her a law-suit in hell?" the witness answered that "she said something of that kind."

Cross-examined this witness said that she did not know when she heard the defendant make the remarks quoted; did not know whether it was a week or a month before the killing. At the time, the defendant was at witness' house, and witness' husband was joking her about Frank White's breaking out her window lights and rocking her house. The defendant made the remarks in a joking manner, and the witness thought she was funning. She did not use the name of the deceased, nor did the witness know that she meant him.

Bill Moore corroborated his wife as to the statement alluded to, but on cross-examination said that the defendant was rather serious at the time, and grew more so as they "talked about it." The witness did not try to dissuade her from it, nor advise her against it in any way.

Witness related these facts to Pete Foreman, about two weeks before this trial.

Lee Stone, for the State, testified that he was at the defendant's house two or three evenings before the homicide, attempting to reconcile differences between her and her husband, the deceased. To his advice to go back and live with him, she replied that she would not live with him to save his life; that he had treated her like a dog; had taken all of her best things, and that she would fix him yet.

Cross-examined the witness said that he did not know what the defendant meant by the expressions quoted. The witness was a witness in the trial of Charles Reed for this same offense, but did not state these facts, because he was only asked by counsel whether or not the defendant said anything to him about killing the deceased.

Manda Davidson testified, for the prosecution, that she went to the defendant's house about four o'clock on the evening of the homicide, and found Dick Van, Charley Reed, and the defendant there, the latter standing near the stove where she had been ironing. Reed had a pistol in his hand when the witness went into the house, which he dropped down by his side. Dick Van had some balls in his hand. Reed said something to him about the balls, which the witness did not understand. When the remark was made about the balls, the defendant hunched Reed with her elbow, and said, "you negroes are all fools, any way."

The night of the killing, Reed came to Henry Bartee's house, where witness was staying, after all in the house had gone to bed, and asked if the defendant was there. Bartee's wife answered that she was not, and asked who he was. He answered "never mind that; is Manda White here?" It was late when this occurred, but the witness did not know the hour. The latter part of this witness' testimony was corroborated by Patsey Bartee.

Rhoda Davidson testified, for the State, that she saw the defendant and the deceased together, at her house, on the day before the killing. The deceased came first and went off. Presently the defendant came, and shortly afterwards the deceased returned, and the two had a talk. The deceased wanted the defendant to return to and live with him. She told him that she was going to move to Mr. Fletcher's, and would talk to him further about it. They were talking in a friendly manner, and talked for about an hour and a half. On the evening of the killing the defendant again came to the house of the witness, and in a short time the deceased came. The two went out of the house, back of the kitchen, and had a talk. The defendant agreed that if the deceased would restore her things, she would try him once more. While the deceased and the defendant were in the house talking, Reed came into the room where the witness was, and threw a key into a chair and told witness to give it to the defendant. He then left without seeing deceased or defendant, and without being seen by them. The defendant and deceased got through talking, and left the house of the witness together about dark.

This witness stated, on cross-examination, that she understood that the key left by Reed was the key to the defendant's house, and she delivered it as requested by Reed. The defendant intended to move into a house at Mr. Fletcher's on the day succeeding the killing, and had fixed up for that purpose the day before.

Lee Foreman, on behalf of the State, testified that himself and Bartee saw a man and woman whom he took to be the defendant and the deceased near Hall's stable, after supper on the night of the killing. They were talking, and, as the witness and Bartee passed them, the man asked the woman to kiss him. She replied either, "what do I want to kiss you for?" or, "turn me loose, and I will"— the witness could not say which.

Lou Dixon, for the State, testified that on the night of and before the killing of the deceased, at about ten o'clock, the defendant came to her house, where several men were congregated. She passed to the door and beckoned to the witness. The witness went to the door, and the defendant asked her "have you seen that fellow?" Witness asked "what fellow?" And she replied "Charley Reed." The witness told her that she had not seen him in two or three days. The defendant then said to witness, "if any one asks you who I was looking for, tell them no one that you know of."

Cross-examined the witness stated that she did not know what the defendant wanted with Reed. She supposed that she was expected to make the answer quoted, in the event any of the men present should ask who the defendant was seeking. The defendant, on leaving witness' house, went towards Rhoda Davidson's house, where, as the witness understood, she obtained the key to her house from Reed. During her residence with the deceased, the defendant had often been to witness' house, looking for deceased, at a later hour than on the occasion referred to.

Edith Scott, for the State, testified that she was at defendant's house twice on the evening of the killing. The first time she went she saw defendant, Dick Van, Manda Davidson and Charley Reed, but did not see the latter with a pistol. At a later hour, about dusk, she went back, and met the defendant leaving. She saw Reed sitting by the stove, holding a pistol up to his mouth. No one else was present.

Cross-examined, the witness said that the pistol was a large one. She could not say whether it was an entire pistol or a part of a pistol. Reed made no effort to conceal it, and, when asked by the witness what he was doing with it, answered that he was liable to carry it. The defendant contemplated moving the day after the killing.

Dick Brockman was introduced by the State and testified that he occupied the north and the defendant the south end of the same house. Their rooms were separated by a thin partition, which did not reach the ceiling. On the night of the homicide and before it occurred, Reed came into the witness' room, and inquired for the defendant, saying that he had heard that she and deceased had become reconciled; that he and deceased had had some words, and that he would stay in the house no longer. The witness told him that if he thought best to leave, "all right." He replied that he thought he had best move out that night. The defendant came into the room at this time, and she and Reed passed into her room together, closing the door. The witness heard them talking in the room, but could not understand what they said. The witness went to sleep and was awakened by the shooting, and went into the defendant's room, where he found Murrell and Bartee. The defendant was on her knees, holding the deceased's head. She had something like a shawl around her shoulders. The witness could not say that she was dressed.

On cross-examination this witness stated that shortly after the shooting the defendant commenced screaming, and screamed like a woman frightened near unto death. She called to the witness to come into the room. There were two beds in the room, one spread on the floor and the other on a bed-stead. The deceased was lying with his head towards the door and had on all of his clothes.

D. J. Taylor testified, for the State, that he was a policeman at the time of the killing. He heard the shots and went to the house, where he found several parties. The defendant was sitting by the stove, and was, the witness thought, dressed. She had on something like a shawl. The witness searched for arms but found none in the house, nor did he find any bullet holes in the floor.

On cross-examination he identified a club exhibited as one he found in the room. The door to the room was shattered and looked like it had been struck by lightning. It had been broken in from the outside, and apparently the breaking was recent. The deceased had no arms about his person.

Mark Gibson, for the defense, testified to witnessing a quarrel between deceased and Reed a few days before the killing. Reed declined to fight, saying that he had been sick or drunk, and was not able, and turned off. The deceased slapped him on the shoulder and said: "God d—n you, I will get you yet." The deceased was the older and heavier man, but Reed the taller of the two.

Cy. Cross, for the defense, testified that, on the day of the night on which deceased was killed, the latter applied to the witness for the loan of a pistol, and in reply to question of the witness as to what he wanted with it, he said that he was going to kill Charley Reed. At dusk he again applied for the pistol, but was again refused. He then offered the witness fifteen dollars to assist him in killing Reed. The witness declined, and deceased asked him to say nothing about it.

This evidence was reiterated on the cross-examination, with the further statement that the deceased said that he wanted to kill Reed that night.

Sarah Scott, for the defense, testified that the deceased came to her house a short time after supper on the night of the killing, and stayed as long as two hours. During his stay he remarked that he had been angry with Charley Reed, but would let it pass. When he left at a late hour he said he was going to the lumber yard to bed. Within a half hour the witness heard the shooting. The defendant lived near the witness, and the deceased would have necessarily passed her house in going to the lumber yard.

Riley Wilson, for the defense, testified that, on the Sunday preceding the Wednesday of the killing, the deceased came to his house and saw some cartridges lying on the washstand, and asked the witness for them. The witness gave them to him. He pulled out a pocket pistol, and said that he was going to leave town, but he would kill "one d—d son of a b—h" before he left. The witness and his wife were at the house of the defendant on the night of the shooting, and before it occurred. Manda Davidson came in shortly, and they all sat there talking until a late hour. It was between ten and eleven o'clock when they left. On their way home they saw the deceased and Jake Murrell standing talking together. The witness did not speak to them as he passed them, nor they to him. There was but one outside door to the defendant's room, and the witness knocked upon it when he went there that night. He knows that it was not broken then nor was it broken when he left. The witness is not related to the defendant, but his wife and she are sisters.

E. L. Morris testified, for the defense, that at the time of the killing he was the proprietor of the Commercial Hotel, situated from sixty to one hundred yards from the defendant's house. After he retired, but before he went to sleep, he heard a noise like some one striking against the side of a house or door, which was followed by a crash, and instantly by shooting. The witness thought he heard two or three licks after the crash and just before or at the close of the shooting. They were not like the first licks but sounded more like thuds. The shooting took place while the witness was on his way from his bed to the door, and instantly a woman commenced screaming. The shooting and the screaming came from the same house, and that was the house in which the deceased was killed. The woman screamed like she was shot.

Joe Swan testified, for the defense, that he lived at the time of the killing about two hundred yards east of the house in which White was killed. Just before the shooting began he heard a noise like the breaking in of a door or side of a house, and thought that his mules were breaking out of his stable. He got out of his bed and ran to his west door. The shooting began just as he reached the door, and instantly a woman began screaming. Adrian Underwood, who lived near, also testified to hearing a crashing noise at the time of the shooting.

J. S. Brazelton, city marshal of Gainesville, testified that he reached the house about half an hour after the killing. He found the door, which swung inwards, broken in from the outside. One entire panel and a cross piece had been freshly smashed in. There were two wounds in the body of deceased, near together, high up under the left arm, and within two or three inches of the arm pit. The doctor cut one of the balls out from in front, and much lower down than from where it entered.

Pete Foreman, for the defense, testified that he frequently visited Bill Moore's house, but denied emphatically that Bill Moore told him on any occasion that he (Moore) heard the defendant make threats against deceased, or say that she would "have Frank White killed if it cost her a law-suit in h—l."

Dick Van, for the defense, testified that, on the evening before the killing, he and Reed were at defendant's house. Reed told him that he had bought a pistol, and he asked to see it. Reed took it down and the witness was examining it when Manda Davidson came. Reed did not drop the pistol to his side, nor try to hide it from her when she came in. The defendant did not hunch Reed, nor did she say at any time "you negroes are all fools." When witness finished examining the pistol, Reed put it back where he got it from.

The State, in rebuttal, having proved the loss of the written testimony taken before the coroner's inquest, introduced W. T. Roberts, who testified in substance that he was present at the inquest and asked the defendant, who was a witness, questions. She stated that she and deceased had made up and would live together; that he was to come to see her the night he was killed; that she had made the pallet on the floor for him and Reed to sleep on; that she was asleep at the time of the shooting and was awakened by it; that before she went to bed Reed went out of the door, and she locked it, leaving him standing on the door-step. She said she did not know how White got into the house; that when she went to sleep the door was locked, and he was not in the house.

Two or three other witnesses, in rebuttal, testified substantially as did the witness Roberts. Other matters are indicated in the opinion.

C. L. Potter, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. This appeal is from a judgment of conviction of murder in the second degree, the punishment assessed being confinement in the State penitentiary for a term of five years. The indictment charges this appellant and one Charley Reed with the murder of one Frank White, alleged to have been committed in the county of Cooke, on March 17, 1880.

From the testimony adduced on the part of the prosecution on the trial in the court below, and from bills of exception set out in the transcript, it is manifest that the State relied for a conviction upon proof of one of two positions: First, that this appellant had entered into a conspiracy with her co-defendant, Charley Reed, prior to the homicide, to take the life of the deceased; or, second, that this appellant was present at the homicide, and so participated in the killing as to render her amenable to the law as a principal to the crime of murder. There is no question that the deceased came to a violent death, about the time and at the place alleged in the indictment. It is shown by the testimony, with at least reasonable certainty, that the deceased and the appellant were husband and wife, but that, from some cause not stated in the record, had not been living together for some time previous to the time of the killing; that the appellant, while so living apart from the deceased, had rented a room in a house in the northern portion of the town of Gainesville, Cooke county, where she was living at the time of the homicide, and that, whilst she was so living apart from her husband, her co-defendant Reed had been living with this appellant and occupying with her the same room. There was testimony tending to show that Reed occupied to the appellant the relation of a boarder with her, and that at the time of the killing there were two beds in the room; one spread upon the floor, and the other on a bed-stead. There was also testimony that the killing occurred in the night time and after the ordinary time for going to bed, but the time is not definitely stated. It was also in proof that the only outside door to the room had been violently broken in from the outside of the building; and, when persons living near by, who heard the noise occasioned apparently by the breaking open of the door and the report of two or three shots, went to the place soon after, the deceased was found in the room, dead, and the defendant sitting upon the floor, holding in her lap the head of the dead man; with some testimony to the effect that, soon after the firing had been heard, Reed was seen running rapidly away from the direction of the place where the murder, if murder it was, had been committed. There was proof of disagreement between the defendant and the deceased prior to the homicide, and there was also proof of hard feelings between the deceased and Reed, and of wordy altercations between them, and some proof of threats made by the deceased against the person and life of Reed shortly before the killing. There was also testimony tending to show that a very short time before the killing the defendant and the deceased had compromised their differences and disagreements, and had agreed to live together again, and that the defendant had arranged for a removal, on the day after the killing, to another house in the town, where it seems the parties were to re-unite and live together.

On the subject of proof of the conspiracy between the defendant and her co-defendant Reed to take the life of the deceased, it appears that there was a heated controversy between counsel representing the respective sides of the controversy, pending the introduction of the testimony, as to whether such conspiracy had been proved or not, and wherein certain positions were taken and arguments employed by counsel representing the prosecution, to which counsel for the defendant deemed to be improper to be made in the presence of the jury, and calculated to prejudice their minds against the defendant; and the court declining to interpose, counsel for the defendant took a bill of exceptions, and this action of the court enters into the defendant's motion for a new trial, and is assigned as error committed on the trial below. This subject will be recurred to hereafter. We gather from the bills of exception and by the failure of the judge to charge the jury on this subject that in the opinion of the court the testimony did not establish a conspiracy between the defendant and Reed to take the life of the deceased; and hence we conclude from the record that the position assumed by the prosecution on the subject of such conspiracy fell to the ground and was eliminated from the trial. This action of the court inured to the benefit of the defendant in that it determined one apparent issue in the case in her favor, and whether the action of the court was strictly correct in this particular or not, the appellant ought not to be heard to complain.

It is also shown by bill of exceptions that on more than one occasion during the progress of the trial below counsel for the prosecution attempted to impeach certain of the State's witnesses by showing that they had testified in court contrary to statements made on a former trial; to which defendant's counsel objected, taking the ground that none of the emergencies had arisen which permitted a party to impeach his own witness. The matters set out in these bills of exception have direct reference to the rules of practice in the trial courts rather than to errors for which a judgment should be reversed on appeal. It is a rule of practice in this court not to revise the action of the trial courts as to matters confided to the sound discretion of the judge below, unless it is made to appear that the discretion so confided has been abused to the prejudice of the party complaining.

As to the matters set out in the bill of exceptions just referred to above, it is not perceived that the action of the court, in so far as the *ruling* on the subject under consideration is concerned, could have prejudiced the defendant, for the reason that the result of the ruling was to sustain the position contended for by the defendant's counsel, that a conspiracy had not been proved. This, however, does not meet the entire objection to the course pursued as to the latitude taken by counsel who were assisting in the prosecution and permitted them by the court, over objection by the defendant's counsel. It is contended that the argument used was calculated to create a prejudice in the minds of the jury against the defendant, and that it was used for that very purpose. If it was not used for that purpose, then we confess that we are unable to determine its object. If there was anything in the argument, if argument it can be called, which was calculated to illumine the minds of the court as to the law of the question involved, we are unable to see it. We are of opinion the course pursued was altogether out of place, and that the court should have interfered, and that promptly, to put a stop to it by a peremptory order, to have been enforced on disobedience by the well-known powers with which the courts are armed for the enforcement of obedience to their lawful orders and rulings. This kind of proceeding is well calculated to arouse the feelings and excite the passions of those within hearing. Questions of law may and often do arise as to the admissibility of testimony, and these questions may be discussed by counsel under the control and direction of the court. In practice there can rarely be occasion for denunciation of party or witness in discussing the law at this stage of the proceedings. Whenever a question as to the admissibility of evidence is to be discussed alone to the judge, the jury should be retired out of hearing for the time. In this instance, the jury should have been taken to a place of safety until the storm of words had passed.

As to the right of a party to impeach his own witness, Mr. Wharton says (1 Wharton's Law of Evidence, § 549): "By a technical rule of the English common law, while a party may contradict his own witnesses, though this may discredit them, he is not ordinarily permitted to impeach them, even though called afterwards by the opposite side, either by general evidence, or by proof of prior contradictory statements. By calling the witness, so it is argued, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterwards attack his general character for veracity, that is not only *mala fides* towards the tribunal, but it 'would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him.' In this country, while a party cannot ordinarily discredit his own witness, his right to prove a case inconsistent with that stated by such witness is unquestioned, even though this discredits the witness incidentally. We have also held that even at common law, adverse witnesses who tell a story contradicting that which they had previously given may, on the party calling them being thus surprised, be examined as to their former statements, in all cases where it would appear that a deception has been practiced on the party examining, and that he has been guilty of no negligence or laches. In England, the right to ask as to such former statements has been much agitated, though the weight of authority, at common law, is against the right so to impeach, unless with the limitation just expressed. On the other hand it is urged 'that, although a party who calls a person of bad character as a witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavorable to him, by direct proof of general bad character,'—yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial; that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; that the rule, with the above exception, as to offering contradictory evidence ought to be the same whether the witness is called by one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked that this is a question in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as civil proceedings; that the ends of justice are best attained by allowing free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of proof of contrary statements might be attended with the worst consequences." So far, however, as concerns impeaching witnesses generally this view does not obtain. But a party *bona fide* surprised at the unexpected testimony of his witness may be permitted to interrogate the witness as to his previous declarations alleged to have been made by the latter, inconsistent with his testimony, the object being to probe the witness' recollection, and to lead him, if mistaken, to review what he has said. Such corrective testimony, also, is receivable to explain the attitude of the party calling the witness. But when the sole object of the testimony so offered is to discredit the witness, it will not be received."

We have copied the entire paragraph of Mr. Wharton as embracing an epitome of the general rules of the common law as well as the exceptions and modifications to general rules on the subject under consideration. Besides these common law rules we have a special provision of the Code of Criminal Procedure, which, to the extent to which it applies, is the rule of law governing the question; when it does not apply, as there is no other statutory provision on the subject, the common law rules apply. The article of the Code is as follows: "The rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness." Code Crim. Proc. art. 755. To our minds, it being shown that the State's witnesses had testified on a former trial, the State had a right to suppose they would swear to the same facts on the present trial, and they having failed to do so, it was competent for counsel representing the State to inquire of the witnesses as to what different facts they had testified to, or what contradictoy statements they had made on the former trial, for the purpose of showing surprise at the testimony, or for the purpose of probing the recollection of the witnesses and to refresh their memory, even though they had not stated facts injurious to the party calling them; and in the latter contingency they might have been impeached, under the article of the Code cited, in any other manner except by proving the bad character of the witnesses.

The fault, however, in the proceeding as we find it set out consists in the fact that it does not appear what object counsel had in view in making the inquiry of the witnesses with reference to their testimony in the previous trial, and the further fact that it does not appear that any steps whatever were taken to guard the jury against taking the supposed contradictory statements made on the former trial as evidence against the defendant on the trial then being had before the court and jury, which should have been done, and a failure to exercise this precaution was likely to have resulted prejudicially to the defendant then on trial.

On the trial below several instructions were requested by the defendant's counsel which were refused by the court, and among them the following: "Unless the jury believe from the evidence that the defendant and her co-defendant Charles Reed had conspired together to take the life of the deceased or to do him some serious bodily harm, you will disregard any acts or words of said Reed in your deliberations, for in that event you are instructed by the court that such acts and words are no evidence against the defendant."

This instruction was substantially correct to the extent it goes, but fell short of being all the law on the subject to the extent that it did not include acts done or words spoken by Reed in the presence of the defendant under any of the circumstances mentioned in the Code which would render her guilty as a principal offender, as in such case the law of conspirators would not be the only law which would render the acts or declarations of one evidence against the other. The charge should have been given with the modification suggested, as the attention of the court had been invited to the subject.

Other errors are complained of as having occurred on the trial, some of which are regarded rather as irregularities than as errors which should be regarded as factors in determining the merits of this appeal; and others are complained of which are not likely to occur on another trial.

The testimony is voluminous and peculiar. This we have studied with care, and are constrained to say that, with the exception of some expressions of witnesses unfavorable to the defendant, made use of on direct examination and which were neutralized or done away with on cross-examination, we fail to discover any such testimony as pertinently connects the defendant with the taking of the life of the deceased, either as a co-conspirator with Reed, or as having agreed to the commission of the deed and being present at the time of its perpetration, or as connects her with the killing of the deceased sufficiently to render her liable under the law as a principal in the act or a principal offender under any of the provisions of the Code, so as to support a verdict of guilty of a felony and consign her to a felon's cell, or such as should be permitted to stand as a precedent.

Because of the meagerness and the uncertain and insufficient character of the testimony, and because of the other errors indicated, the judgment of the District Court will be reversed and the case remanded for a new trial.

Reversed and remanded.

JAMES WELDEN v. THE STATE.

EVIDENCE — CORROBORATION OF ACCOMPLICE.—The corroboration of an accomplice required by law in order to warrant a conviction upon his testimony must tend pertinently to connect the accused with the offense. Corroboration as to matter having no tendency in this direction, however thorough and complete, will not suffice. See the opinion *in extenso* on the subject.

APPEAL from the District Court of Brown. Tried below before the Hon. T. L. HUTCHISON.

The opinion discloses the case.

Scott & Jenkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant Welden was convicted of the theft of a horse, upon the testimony of one H. C. Hetler and a witness by the name of Gentry. The evidence of these witnesses was relied upon solely for a conviction, except the want of consent, which was proved by the owner. From the facts sworn to by the witness H. C. Hetler, and the evidence of Gentry, Hetler was evidently an accomplice. This being the state of the case, was there any fact sworn to by Gentry corroborating the testimony of Hetler, and which tended to connect the defendant Welden with the theft of the horse?

The witness Gentry testified as follows: "That he saw the horse stolen tied in the brush about a mile from his place, where H. C. Hetler worked; that he asked said Hetler if he knew what horse it was; he said he did not. The next day I told Hetler again about said horse and that Mathews claimed him. Hetler then told me it was a horse the defendant claimed. I then asked Hetler where the defendant was. He replied that he did not know. He told Hetler that he and defendant had been seen together, and that he thought Hetler ought to know something about it."

There is not a fact in this evidence tending in the remotest degree to inculpate the defendant. It is true that the witness told Hetler that he and defendant had been seen together. The witness is not to be understood as stating that *he* had seen them together. When and where seen is not stated; whether under circumstances tending to connect the defendant with the theft of the horse is not shown. In order to convict the defendant upon the testimony of an accomplice, there must be other evidence tending to connect the defendant with the offense. The accomplice must be corroborated by the evidence of some other witness, and this corroboration must be by proof of some fact tending to *connect* the *defendant* with the commission of the offense. The accomplice may state any number of facts, and these facts may all be corroborated by the evidence of other witnesses; still, if the facts thus corroborated do not tend to connect the defendant with the crime, or if they do not point pertinently to the defendant as the guilty party or as a participant, this would not be such corroboration as is required by the Code. We suggest this mode as a proper test: eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence — evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.

The accomplice in this case speaks of the bell which was taken from the horse. This bell was found where he stated the horse was caught when stolen. This proves but two facts, 1st, that he was present when the horse was stolen, and the bell was taken off of the horse and left where found. 2d. Or if not present, some person informed him of the whereabouts of the bell. That it tended to connect the defendant with the theft of the horse is not shown by any other fact. Standing isolated, such tendency cannot be perceived. The court submitted to the jury a proper charge upon the necessity of corroboration of an accomplice, but, as there was no evidence tending to corroborate the accomplice, such as is required by our Code, the court should have granted the defendant a new trial.

We have not in this opinion undertaken to decide what strength or probative force the corroborating evidence must have, to be a sufficient corroboration to justify a conviction. Upon this point see these cases: *Roberts* v. *State*, 44 Texas, 119; *Gillian* v. *State*, 3 Texas Ct. App. 132; *Hoyle* v. *State*, 4 Texas Ct. App. 239; *Jones* v. *State*, 4 Texas Ct. App. 436; *Roach* v. *State*, 8 Texas Ct. App. 278; *Simms* v. *State*, 8 Texas Ct. App. 230.

In the last cited case, Judge Winkler we think correctly states the rule, which is "that the evidence must tend directly and immediately to connect the defendant with the commission of the offense." This is not a question in this case; for we have seen that there is no evidence either directly or remotely connecting defendant with the offense, except that of the accomplice.

The judgment must therefore be reversed and the cause remanded.

Reversed and remanded.

JAMES MERRITT *v.* THE STATE.

1. **ADULTERY — ACCOMPLICE TESTIMONY.**—In the trial of a man for adultery, the testimony of his paramour as a State's witness is that of an accomplice or *particeps criminis*, and will not support his conviction unless corroborated by other evidence tending to connect him with the offense.
2. **SAME.**—See evidence *held* insufficient in a trial for adultery to corroborate the testimony of the defendant's paramour.

APPEAL from the District Court of Comanche. Tried below before the Hon. T. L. HUTCHISON.

The indictment charged the appellant with adultery with Barbara Edwards, his sister-in-law. His trial resulted in a verdict of guilty, and his punishment was assessed at a fine of $150.

Mrs. Victoria Edwards, the mother of the prosecutrix, and mother-in-law of the defendant, testified for the State that she was present and witnessed the marriage of the defendant and her eldest daughter, Mary, previous to April, 1879, since which time the defendant and her daughter Mary, so married, have been living together as man and wife. On the 10th day of March, 1879, her daughter Barbara, the prosecutrix, gave birth to a child. The first the witness knew of any derangement of Barbara's health was in January, 1879, when she learned of her pregnancy. The defendant at that time lived about a half mile from the witness' house. When the witness saw him after learning of her daughter's pregnancy, she informed him of it, and told him that she was going to take the girl before a justice of the peace and make her disclose under oath the paternity of the child. She told him also that the father ought to support the child. The defendant replied that he thought, too, that the father should provide for the child's support. The witness then upbraided and abused the defendant as the author of her daughter's pregnancy. He did not deny the charge, but merely remarked "I guess you think I am the father of the child."

The defendant afterwards came to the field where the witness and her children were at work, very angry, and by cursing and abusing witness, frightened her and her children very much. He was frequently at the house of the witness for the ten months preceding this difficulty. He always brought his wife with him, and when he stayed all night he and his wife always slept together so far as witness knew. They always went to bed together. There was but one room to the house, and all the family slept in that room.

Cross-examined, the witness stated that she did not remember whether or not she accused the defendant of being the father of the child, nor whether or not he denied it, but when she abused him he "made light of her." She admitted that other young men had associated with the prosecutrix during the year 1879; that one of them had been about the house some, and came home with Barbara on January 4, 1879. Witness did not know his present whereabouts. Another one had also been about witness' house, but if he ever slept with Barbara, the witness did not know it.

The State having declined to prosecute Barbara Edwards, she was introduced and testified to the effect that she gave birth to a child on the 10th day of March, 1879, and that the defendant was its father. The defendant and herself had connection four or five times, each time at the house of the witness, and at night.

On cross-examination she stated that on each occasion the defendant forced her. He attacked her when she was asleep, and she could not help herself. She was afraid to call out. At these times she was sleeping in bed with her brother, and in the same room with her mother and sister, the defendant's wife. The force used was putting his hand over her mouth. The first time the defendant forced and had intercourse with the witness was sometime about the last of April, 1879; the next time about the first of May following; the third time about the 15th of June following, and the fourth time a night or two later. He never had intercourse with her after June, 1879.

The witness did not disclose these facts to any one until January, 1880, when her pregnancy became apparent. She visited the defendant's house frequently after June, 1879, and was there a few days before her pregnancy was discovered. The defendant had no connection with her subsequent to June, 1879. He quit of his own accord — the witness did not know why. He always had connection with her at her house, at night on the bed. The defendant always brought his wife with him, and the household all slept in the same room. The child died and the witness never saw it. The only force used was by putting the hand over the mouth of the witness.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

White, P. J. The offense in this case, to wit, "adultery," is charged to have been committed on the 20th day of April, 1879, and at divers other times before and after that time. The indictment was filed the 18th day of June, 1879, before our Revised Penal Code went into operation. On the trial the judge charged the jury the law in accordance with the definition of the offense as given in art. 333, Penal Code, instead of the law as in force when the offense was committed. Pasch. Dig. art. 2024. Under previous decisions, however, there is really but little if any difference in the construction placed upon the old law and the statute as at present existing. *Swancoat* v. *State*, 4 Texas Ct. App. 105; *Parks* v. *State*, 4 Texas Ct. App. 134; *Merrill* v. *State*, 5 Texas Ct. App. 447.

But two witnesses were examined, the mother of the girl with whom the adultery was alleged to have been committed, and the girl herself. The girl, who was in law a *particeps criminis*, as such should have been corroborated by other testimony tending to establish the guilt of defendant. In our opinion this was not sufficiently done. The girl's mother testified to nothing corroborative in the slightest degree, save that defendant stayed at her house several times with his wife, who was also her daughter; that all the parties slept in the same room — there being but one room to the house; defendant and his wife always going to bed together; and that the girl became pregnant and had a child. On the other hand she also avers that a Mr. Morning, who had since left the country, and Bud Lambert had both been about her house "some during the year 1879,"— though she did not know that either of them had ever slept with her daughter. The girl swears positively to four or five separate and distinct occasions upon which defendant had obtained knowledge of her person,— each time at night and on her bed in which her brother was sleeping with her, and in the same room where her mother and defendant's wife, her sister, were also sleeping, and that each and every time the act was committed by force and against her consent. The fact that the girl had been indulging in illicit commerce with some man is incontrovertibly established by the fact that a child was born of her; but that its paternity is attributable to defendant's agency, or his adulterous connection with her even, is not established by corroborative evidence, independent of her own statement, sufficient in our opinion to warrant the conclusion of his guilt to a moral certainty and against any other reasonable hypothesis.

The evidence not being sufficient to support the verdict and judgment, the court below erred in not granting a new trial; and the judgment is reversed and cause remanded.

Reversed and remanded.

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32 284

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T. W. WALLACE v. THE STATE.

PRACTICE.— JUDGMENT UPON A PLEA OF GUILTY will be reversed unless the record shows that the defendant was admonished by the court as to the consequences of such plea, and that he was sane and uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt.

APPEAL from the District Court of Erath. Tried below before the Hon. T. L. NUGENT.

The indictment charged the appellant and one J. M. Saunders with the theft of personal property exceeding $20 in value. A severance being granted, the defendant pleaded guilty and his punishment was assessed by the jury at two years' confinement in the penitentiary. Motion for new trial was made and overruled, and the case appealed. The judgment is now reversed because of the failure of the court to comply with an imperative statutory provision governing pleas of guilty.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The record states that the defendant pleaded guilty, but fails to show that he had been admonished by the court as to the consequences of such plea, and that he was sane and uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt. Code Crim. Proc. arts. 534, 518 and 519; *Saunders* v. *State*, decided at the present term. *Ante*, p. 336.

Because the plea upon which defendant was tried was insufficient in law, the judgment is reversed and the cause remanded.

Reversed and remanded.

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JOHN HORNBECK *v.* THE STATE.

THEFT — INTENT.— In order to sustain a prosecution for theft, when the taking was originally lawful, the proof must show that the taking was obtained by some false pretext, or with the intent to deprive the owner of the value of the property and to appropriate it to the use and benefit of the taker, and, furthermore, that the same was so appropriated.

APPEAL from the County Court of Hill. Tried below before the Hon. A. W. PARHAM, County Judge.

The prosecution was for theft of property valued at less than $20. The punishment imposed was a fine of $25 and six hours' confinement in the county jail.

On behalf of the State it was shown that the defendant was a tenant of Mrs. Fauquer, the prosecuting witness. The witness had loaned the defendant and his wife the property alleged to have been stolen, consisting of a table, pillows, bed-clothing, etc., with the understanding that when they moved they were to leave the property on the place. The property disappeared with them.

On behalf of the defense it was testified that the bed-clothing was purchased by the defendant's wife after it was borrowed, and that the defendant paid for the table by making a lounge and delivering it to the prosecuting witness.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was tried on an indictment by which he was charged with the theft of certain specified articles, amounting in value to an aggregate not sufficient to constitute a felony. He was convicted and fined twenty-five dollars, and was ordered to be imprisoned in the county jail for six hours. If this prosecution can be maintained at all, it cannot be under the general statute of theft, Penal Code, art. 724, but under article 727, which is as follows: "The taking must be wrongful; so that, if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft; but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof and to appropriate the property to the use or benefit of the person taking, and the same is so appropriated, the offense of theft is complete."

To constitute the offense as defined in this article, the taking being originally lawful, possession must be obtained either by the employment of some false pretext, or it must be obtained with an intent existing in the mind of the taker, at the time the possession was obtained, to deprive the owner of its value and to appropriate the property to the use and benefit of the taker, and, besides these requisites, such a taking would not be complete so as to constitute the crime of theft, until the taker has so appropriated the property to his own use and benefit.

In the present case we fail to perceive any evidence whatever of the employment of any false pretext, or of any intent existing in the mind of the defendant to deprive the owner of the value of the property or any part of it, and to appropriate it or any part of it to the use and benefit of the defendant, or proof of any circumstances from which the jury could reasonably infer such false pretext, or such intent to deprive and appropriate. We do not deem it important to consider any other feature of the case as presented by the record; but, believing that the testimony is not sufficient to support the verdict and judgment, the judgment must be reversed and the case remanded.

Reversed and remanded.

HENRY SCHENAULT v. THE STATE.

1. STATUTE CONSTRUED.— The word "adult" as used in art. 496 of the Penal Code signifies a person who has attained the full age of twenty-one years.
2. AGGRAVATED ASSAULT — CHARGE OF THE COURT.— To sustain a prosecution for aggravated assault, the State relied upon the fifth clause of art. 496 as to the cause of aggravation. The defense asked the court to charge the jury that if they believed from the evidence that the accused was under twenty-one years old they must acquit of aggravated assault. The accused's age was admitted to be eighteen years, but the court refused to give the charge asked. *Held*, error.

APPEAL from the County Court of Kimble. Tried below before the Hon. G. E. STEWART, County Judge.

The indictment charged the appellant as an "adult male," with an aggravated assault upon Bob Sessam, a child. His punishment was assessed at a fine of $100, and one month's confinement in the county jail.

The evidence shows that the appellant whipped the principal witness, who was twelve years old, with a rope, doubled, striking him twelve or thirteen times, and inflicting great bodily pain. It was agreed by counsel that the appellant was but eighteen years old at the time the offense was committed.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. It is an admitted fact that the defendant at the time of the trial was not over eighteen years of age. On the trial, counsel for the defendant requested the court to charge the jury to the effect that if they believed from the evidence that the defendant was under twenty-one years of age and a male they must acquit him of an aggravated assault. This charge among others was refused by the court, and the ruling reserved by bill of exceptions.

The question raised by the refusal of the court to give this instruction, and which is the only one necessary to be considered, is this: what is the legal signification of the word *adult*, as found in the definition of an aggravated assault, in article 496 of the Penal Code, in prescribing and defining the circumstances under which an assault or battery becomes aggravated? It is declared in subdivision 5 of this article that such is the case, "when committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child." The authorities all agree, so far as we are advised, that at common law the word *adult* signifies a person who has attained the full age of twenty-one years. The word *adult* seems to have a well defined meaning both in law and in common acceptation. Mr. Bouvier defines the meaning of the word as used in the civil law, with which we have no present concern, and says: "In the common law an adult is considered one of full age.'' Mr. Wharton defines the word as signifying "a person of full age." Mr. Webster gives as one of the meanings "one who has reached the years of manhood." In *Raven* v. *Waite*, 1 Swanston's Ch. R. 553, cited by Mr. Bouvier, the term *adult* and the phrase *having arrived at the age of twenty-one years* appear to be used interchangeably.

It is true that there are provisions of the Code which relate to the age at which a person must have arrived before he can be punished criminally or for particular offenses. For instance, no child can be convicted of any offense committed before arriving at the age of nine years, nor for an offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act which constitutes the offense; nor can any one be punished capitally for an offense committed before he has arrived at the age of seventeen years, but he may be punished otherwise than by death. Penal Code, arts. 36 and 37. Statutes of this character have no reference to, nor do they have any bearing upon, the question under consideration. The word *adult* is not specifically defined by statute. The word *minor*, however, is, and as used in the Penal Code signifies a person under the age of twenty-one years. Penal Code, art. 40. One cannot be said to have arrived at full age, or be said to be an adult person, until he has passed the age of minority.

We are of opinion, therefore, that agreeably to the plain direction of the statute one cannot be convicted of an aggravated assault or battery on a female or a child until arriving at the age of twenty-one years, and, having passed the age of minority, has attained full age, under the provisions of article 496, clause 5, Penal Code, above cited. Whether he could be convicted of any other offense, or of an assault with intent to commit some other offense, is not involved in the present investigation. All we intend to decide is that the word *adult*, in the clause of the article quoted, means one who has arrived at the age of twenty-one years. We are therefore of opinion that the charge asked by the defendant's counsel and refused by the court, as set out above, was a correct enunciation of the law of the case and applicable to the conceded facts in evidence, and that it was error in the court to refuse it. Because of this error the judgment will be reversed and the case remanded for a new trial.

Reversed and remanded.

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W. H. SMITH v. THE STATE.

OFFICIAL EXTORTION, as defined in article 240 of the Penal Code, is the wilful demand and reception by any officer authorized by law to receive fees of office, or by any person employed by such officer, of "higher fees than are allowed by law" for the services in question. If no fees were allowed by law for the services in question, then no prosecution under this provision can be maintained; and an indictment is bad which shows on its face that the services were not services for which any fees were allowed by law. See the opinion as to the requisites of an indictment for official extortion.

APPEAL from the District Court of Atascosa. Tried below before the Hon. G. H. NOONAN.

The indictment was presented in November, 1879, and alleged that one G. W. Chapman had died in said county about the 1st of the preceding July, leaving a will of which he appointed his wife the executrix, and exonerating her from bond or accountability to the courts, except to file an inventory of the estate; that Smith, the present appellant, being then and there the judge of the County Court of said county, did, at its July term, 1879, admit the said will to probate and appoint the testator's widow to be the executrix of it, and that these were the only legal services ever rendered by him then or ever about said Chapman's estate; that no exhibits or accounts, other than the inventory and appraisement, had ever been filed by the executrix; but that, on or about August 1, 1879, in said county and State, "the said W. H. Smith, so being judge of said County Court as aforesaid, did wilfully and extorsively, and by color of his office, demand and receive of and from the said Caroline Chapman as executrix of the last will and testament of the said G. W. Chapman, deceased, higher fees than were or are allowed by law, to wit, the sum of 236.85 dollars, he the said W. H. Smith as such judge then and there claiming said sum of money to be due him as such judge for and as commissions at the rate of one-half of one per cent. upon the appraised value of the estate, real and personal, of the said G. W. Chapman, deceased, whereas in truth and in fact no sum of money or fees were due the said W. H. Smith as such judge of the said County Court of Atascosa of and from the said Caroline Chapman, as executrix of the last will and testament of the said G. W. Chapman, deceased, as commissions at the rate of one-half of one per cent. on the estate of the said G. W. Chapman, deceased. And so the jurors aforesaid, on their oaths aforesaid, do further say that the said W. H. Smith did, as such county judge of said county of Atascosa, wilfully, extorsively, and by color of his said office, on the day and year last aforesaid, in the county aforesaid, demand and receive, in manner and form aforesaid, higher fees than were or are allowed by law; contrary," etc.

The defense moved to quash this indictment because it charged no offense, and alleged no facts constituting any offense known to the Penal Code; and the motion specified with particularity the many exceptions alleged against its sufficiency. The court overruled the motion to quash, and this is complained of by the appellant.

A trial on the plea of not guilty ensued. The State put in evidence the will of Chapman, deceased, and its probate, together with the inventory of the estate, which aggregated over $40,000.

H. W. Chapman, testifying for the State, said that in the summer of 1879, he asked the defendant for his bill against the executrix, and was presented by the defendant with a bill which aggregated $236.85, consisting almost entirely of a charge of one-half of one per cent. on the inventoried value of the estate. The defendant said to witness that the bill looked large, but he believed it to be correct, and read some law to witness out of the Digest. As requested by the defendant, the witness left for him in bank at San Antonio the amount of the bill. This was all the evidence in the cause.

The jury found a verdict of guilty, and assessed a fine of $100 as the punishment. A new trial was refused, and the defendant appealed.

D. P. Marr, for the appellant, filed an able brief and argument.

H. M. Holmes, for the State.

HURT, J. The appellant was indicted, convicted and fined one hundred dollars for a violation of art. 240 of the Penal Code. Said article reads as follows: "If any officer authorized by law to demand or receive fees of office, or any person employed by such officer, shall wilfully demand or receive *higher* fees than are allowed by law, he shall be punished by fine not exceeding one hundred dollars for each offense." The indictment charges that the defendant received higher fees than was authorized by law, but it also sets out facts showing beyond all question that the fees demanded or received were *not authorized* by law. There was a motion to quash, which was overruled, the ruling of the court was excepted to, and the action of the court is here assigned as error.

By reference to the above article (240) it will be found that to constitute the offense therein sought to be punished, these facts must exist: The person sought to be convicted must be an officer or a person employed by an officer. The officer or person so employed must be authorized by law to *demand* or *receive fees of office.* The law must have allowed fees for the service rendered, and for which the fees were demanded or received. The fees demanded or received must have been *higher* than those *allowed* by law. The defendant must have demanded or received these higher fees. There is no law in this State punishing the demanding or receiving of fees *not allowed* by law, by officers authorized by law to demand or receive fees. The offense (the other elements attending) consists in demanding or receiving higher fees for services than are allowed by law for these services. If this indictment had omitted the allegation that the fees demanded or received were higher than allowed by law, it would have been clearly defective. This allegation being imperatively demanded to make the indictment good, evidence showing that defendant demanded or received pay as fees not allowed by law would not have supported the indictment. We therefore conclude that if the indictment state facts from which it appears that the fees were not higher but were unauthorized by law, it is bad, and should have been quashed.

Article 3830 of Paschal's Digest provided that "if any officer herein named shall demand or receive any *other* or higher fees," etc. Under this article the indictment charged that the defendant demanded fees greater than were allowed by law; and, in specifying, alleged that the fees charged were for certain orders for which no fees were in fact *allowed* by law. It was held by the Supreme Court that the indictment should have been quashed. *State* v. *Smythe*, 33 Texas, 546. In *Hays* v. *Stewart*, 8 Texas, 359, Judge Lipscomb holds that, under an act which provides, "That if any of the officers herein named shall demand and receive any *other* or *higher* fees than are prescribed in the act for any services therein mentioned he shall be liable to the party aggrieved for four-fold the fees so unlawfully demanded and received, to be recovered in any court of competent jurisdiction," that an action by the party aggrieved for the penalty under this act could not be sustained, unless the officer was entitled to charge *fees.* The act allowed the surveyor three dollars for each English lineal mile *actually run.* The surveyor charged for lines not actually run by him. There was no dispute as to the rate of fees, nor was there any evidence of an attempt to collect higher fees than the law allowed. The dispute in that case was about the surveyor's right to collect the fees for two lines at all. Under this state of case, the learned judge says: "It is a well established *rule* of law that in a suit to recover a penalty imposed by statute, the charge should be specifically made and fully proven. The statute imposing a four-fold penalty to be paid to the party aggrieved, besides a liability to be fined and removed from office, is highly penal in its character, and was doubtless intended to punish a wilful violation of law, and not a mistake that might honestly be made."

The principle above enunciated applies directly and with great force to the case before us. Under the present act, as we have seen, the crime consists in demanding or receiving *higher* fees than are allowed by law. The amount of the fees being first fixed by law for specified services, higher fees cannot be demanded without the party demanding the same being guilty *of an offense* such as should be denounced and punished by our law. But on the other hand it frequently occurs that officers have reasonable grounds for believing and do believe that they are entitled to fees, when in fact they are not. Hence our Code *denounces* the officer who demands or receives *higher* fees than are allowed by law, and not fees unauthorized by law.

As the indictment shows upon its face that the fees demanded and received were for services for which no fees were allowed by law, we are of the opinion that it was fatally defective, and should have been quashed. There were other items for services for which the law allowed fees, but the amount demanded for these was that which the law allowed, and no more.

For the error in overruling the motion to quash, the judgment is reversed and the cause dismissed.

Reversed and dismissed.

WINKLER, J., does not concur in this opinion.

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JAMES H. BOONE v. THE STATE.

1. LOCAL OPTION LAW.—A regular practicing physician and druggist in a locality in which the local option law is in force, prescribing for a patient a compound of which whiskey is a necessary ingredient, is authorized to sell the whiskey without requiring the prescription of another physician.
2. SAME—ELECTION.—The action of the Commissioners' Court in ordering an election under the local option law, the election and all of its incidents, must conform strictly to the requirements of the statute, or the election will be void.
3. SAME.—The law requires that at its first regular session after the petition is filed, the Commissioners' Court shall order an election to be held at all of the regular voting places within the proposed limits, upon a day not exceeding thirty and not less than fifteen days from the date of the order. *Held*, that when it appears that the election was ordered and held thirty-one days after the date of the order, the election is void.

APPEAL from the County Court of Wilson. Tried below before the Hon. H. H. ABNEY, County Judge.

The opinion discloses the case.

A. J. Williams, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was a druggist and the family physician of James Adams. Mrs. Adams being very sick, the defendant was applied to by her husband for medicine. He (defendant) prescribed camphor gum and chloroform, and when the husband inquired how the medicine should be given, defendant told him that it should be given in whiskey; whereupon Mr. Adams requested of defendant a prescription to one Dr. Brown for the whiskey. Defendant remarked that he could give the prescription, or could furnish the whiskey, as he kept it in his office for medical purposes, to administer to his patients. Thereupon Adams got the whiskey, receiving at the same time (from defendant) instructions how to mix it and the medicine, and how to administer the same to his wife.

It is shown by the evidence that Mrs. Adams was not only actually sick, but very sick; also that the whiskey was a stimulant absolutely required to be given with the other medicine. These being the facts, had the defendant the right to sell the whiskey, or was he required (under these circumstances) to send her husband to some other person with a written prescription for the whiskey, as is provided by art. 379 of the Penal Code? We think not; for if there was a case of actual sickness which required the whiskey as a medicine, the defendant, being a regular practicing physician, had the right to sell it without having the prescription of another physician. Art. 379 does not apply to regular practicing physicians, when the whiskey is sold as a medicine in case of actual sickness; but to persons who are not physicians, and therefore are not supposed to be proper judges of the necessity of giving this stimulant as such, or as a solvent of other medicines.

There is another fact shown by the record in this case, which will compel a reversal of the judgment. This being a prosecution for the violation of art. 378, known as the "Local Option Law," the election and all of the steps taken by the Commissioners' Court in reference thereto must have been in pursuance of the act governing the same. The Revised Statutes, art. 3229, require that the Commissioners' Court, at its first regular session after the petition is filed, shall order an election to be held at the regular voting places within the proposed limits, upon a day *not exceeding* thirty nor less than fifteen days from the date of said order." The order was made on the 10th day of August, and the election was ordered on the 10th day of September, being one day over thirty. This was fatal to the legality of this election; for, if the election resulted favorably to prohibition, its effects within that territory would be the same as an act of the Legislature; in other words, would be legislative — law-making; and therefore every provision of the act authorizing this character of legislation should and must be strictly construed.

The election, being held at a time unauthorized by law, and in direct conflict with the plain provisions of the same, is utterly void, and cannot be made the basis of a prosecution. For the reasons above indicated, the judgment is reversed and this prosecution dismissed.

Reversed and dismissed.

DAVE SMITH *v.* THE STATE.

1. **EVIDENCE.**—To justify a conviction there should be clearness and certainty in the proof,—such as would amount to that which is morally certain.
2. **SAME.**—See evidence held insufficient to sustain a conviction for unlawfully carrying a pistol.

APPEAL from the County Court of Falls. Tried below before the Hon. E. C. STUART, County Judge.

The opinion discloses the entire case.

Preston & Holland, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of carrying a pistol on or about his person. Does the evidence support the verdict, is the only question presented.

There was but one witness, and his testimony was substantially as follows: "I requested defendant to go with me to a burial, a short distance off. He went with me to the grave-yard, which was a public place. While at the grave-yard, I saw a belt around the waist of defendant. I saw, underneath the coat of defendant, what I took to be the handle of a pistol. It did not look like the handle of a knife, but like the handle of a pistol. Would not swear that what I saw was a pistol."

This is very unsatisfactory evidence; there is no description of the thing which he saw and which looked like the handle of a pistol. We are not informed whether there was a scabbard or not. If so, was it for a knife or pistol? What was its size and shape? Was this supposed handle in the scabbard? There is no fact given upon which this witness' opinion was based. To justify a conviction there should be clearness and certainty in the proof,—such certainty as would amount to that which is morally certain.

We cannot give our consent to a conviction supported by such evidence as the above. The judgment is therefore reversed, and the cause remanded for a new trial.

Reversed and remanded.

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WILLIAM AND ROBERT EANES v. THE STATE.

1. MURDER — MANSLAUGHTER — "ADEQUATE CAUSE." — The Penal Code (article 597, § 4) makes insulting words or conduct towards a female relative of the slayer an adequate cause for the passion which reduces voluntary homicide to manslaughter, provided (art. 598) the killing occurred immediately upon the happening thereof, or so soon thereafter as the slayer, having been informed of the insults, met with the person killed. These provisions render inapplicable to such a case the requirements of article 594 that the provocation must arise at the time of the killing and the passion be not the result of a past provocation. The time intervening between the slayer's apprisal of the insult and his first meeting with the deceased is not a material consideration; but it is essential not only

that the adequate cause have a status in the evidence, but that the state of the slayer's mind predicated thereon did actually exist at the time he killed the deceased.

2. SAME.— In the state of case contemplated in said articles 597 and 598 four issues of fact are presented: 1, the occurrence of insulting words or conduct on the part of the deceased towards a female relative of the accused; 2, whether that was the real provocation which induced the killing; 3, whether the killing took place immediately on the happening of the insult, or as soon thereafter as the accused, having been apprised thereof, met with the deceased; and 4, whether the accused, when he killed the deceased, was affected by such a degree of anger, rage, resentment, or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection. But in determining these issues the jury should be instructed to consider the aspect in which the evidentiary circumstances presented themselves to the accused at the time he acted upon them.
3. SAME — CHARGE OF THE COURT.— With reference to the issues above indicated, the jury should be instructed upon the legal import of the statutory phraseology descriptive of the particular passion involved in the issues. For instance, if anger be the passion imputable to the provocation, its characteristics should be so explained that the jury can distinguish it from rage, resentment, or terror. See the opinion *in extenso* on this subject.
4. SAME —"COOLING TIME."— The evidence on such issues may also, as in the present case, necessitate an exposition of the legal import of "cooling time;" *i. e.*, interim sufficient for the mind of the accused to have become calm enough to enable him to act coolly and understandingly in view of the probable consequences.
5. SAME.— If, as in the present case, the slayer did not act on his own knowledge, but on information given him by others, the question with regard to the "cooling time" is not whether, after he received the information and before he acted upon it, a sufficient time elapsed for his mind to cool, but whether his anger still prevailed when he first met with and killed the deceased.
6. CHARGE OF THE COURT.— When there is no evidence tending to prove a lower grade of offense than that charged in the indictment, the court may well decline to instruct upon such lower grade; but, on the other hand, the instructions given to the jury should never in effect withdraw from them the issue of guilty or not guilty.
7. SAME — REASONABLE DOUBT.— When necessary, as it often is, that the jury be instructed on the doctrine of reasonable doubt as between the degrees of the offense charged, the instruction should be expressed in language comprehensible to non-professional men.

This is scarcely accomplished by the abstract proposition that "the rule of reasonable doubt applies to the grade of offense."

8. **Privilege of Counsel.—When an advocate grossly abuses his privilege to the manifest injury of the opposing party, it is the duty of the court to stop him *instanter;* and persistent impropriety of this character may be cause for new trial. But a party whose own outrageous conduct provoked the impropriety is not entitled to complain of it.**
9. **Same — Practice.—If the course of a trial be interrupted by scenes of such excitement as will probably frustrate a fair and impartial consideration of the case by the jury, the court should promptly exert its amplest authority to suppress the disturbance; but if this be ineffectual to restore immediate order and decorum, the further progress of the trial should be postponed, and adequate measures to enforce order be provided for the resumption of proceedings. Proper practice under such circumstances will obviate any occasion for resort to the revisory authority of appellate tribunals.**

Appeal from the District Court of Travis. Tried below before the Hon. E. B. Turner.

In May, 1880, the grand jury of Travis county presented an indictment by which the appellants, William Eanes and Robert Eanes, were jointly charged with the murder of C. D. McMillan, on February 19, 1880, by shooting him with pistols. In July, 1880, they were jointly tried and both convicted of murder in the first degree, but the punishment of William Eanes was assessed at death, and that of his brother and co-defendant at a life-term in the penitentiary. Their motion for a new trial being overruled, they appealed.

The case turns upon facts and incidents of a very interesting character, and involves, as will be seen by the opinion of this court, a number of novel and important questions. The rulings on some of these questions necessitate a full presentation of the material details of the elaborate evidence adduced both by the prosecution and the defense. It may be stated in a general way that the proof was clear that McMillan came to his death, on the day alleged in the indictment, and in his own house and the presence of his young wife, by pistol shots fired by one of the appellants, the other being in the house at the time. The provocation relied upon by the defendants was the ravishment and ruin of their sister, imputed by them to the deceased, on information communicated to them by her early in the day on which the killing was done. This line of defense raised the questions chiefly contested in the trial court as well as on the appeal.

At the time McMillan was killed he was residing in the suburbs of the city of Austin, with his wife and their little daughter, Rosa, who was about eight years old. Previously they had lived several miles in the country, and near the father of the appellants, and while there an intimacy had grown up between Mrs. McMillan and Miss Annie Eanes, the young sister of the appellants. About a month before McMillan was killed, this young lady remained with Mrs. McMillan for a week or ten days, and when she left she came to Austin in company with McMillan, and, instead of returning to her father's, she was "missing" until discovered by a brother-in-law a day or two before the homicide, at a town about twenty miles from Austin.

Mrs. Lizzie McMillan, the widow of the deceased, was the first witness examined by the State. She testified that about one o'clock on the 19th day of February, 1880, the two defendants, William and Robert Eanes, came to her house, shook hands with her and came in, sat down, and engaged in a conversation from which she understood that Miss Annie Eanes was still missing. She told them that she had heard that Maurice Moore (a brother-in-law of the appellants, and separately indicted for complicity with them) had traced Annie's trunk to the depot of the International Railroad, and witness asked where Maurice Moore was. William Eanes replied that Moore was at home and had abandoned the search for Annie, and that it would have to be continued by Robert Eanes and

Charles, a younger brother. To the best of witness' recollection, William Eanes then asked her if McMillan had ever brought any letters to Annie during her stay with the McMillans? Witness replied that she did not think her husband had ever brought any letters to Annie, and then Williams Eanes asked if letters could not have been brought to Annie by Mr. Allen, a man who took McMillan's place as the driver of Mr. Hancock's dairy-wagon. William Eanes added that he would like to see McMillan to ascertain where Allen could be found. Witness asked the defendants if they would not stay to dinner, but they said they would go to their uncle's, and would return. In this conversation Robert Eanes took but little part, but was present all the time.

About half an hour after they left, witness' husband came home to dinner, and she told him that William and Robert Eanes had been there and that Annie had not been found. Witness, with her husband and their little daughter, sat down to dinner. While at the table the defendants came to the door, and either witness or her husband got up and went to the door, and they came in. McMillan and William Eanes commenced talking about Miss Annie not having been found, and discussed the color of a trunk she had got from the witness, who then remarked that in the next room there was another trunk, which was painted exactly like the one Annie had got from her. McMillan then got up, and he and William Eanes went into the next room to see the trunk. Witness, without hearing a word pass between her husband and William Eanes, heard a shot, and her husband came running back into the room where she had remained, and, without uttering a word or a groan, he fell upon his face. William Eanes was following and firing at McMillan as the latter came running back into the room where witness was. Witness could not say how many shots were fired, but knew there were several. McMillan had no weapons on his person, but always kept a pistol in the house. As soon as the deceased fell, the defendants went out of the house. After the shooting the only utterance the witness heard from either of them was the word "sister" in the voice of William Eanes. At both of their visits on that day they were received and treated kindly, and until the first shot was fired the two families, so far as the witness knew, were very friendly, and until the deceased and William Eanes passed into the room to look at the trunk nothing had occurred to mar that friendship. Witness had known the Eanes family about fifteen months. When McMillan fell, Robert Eanes was not more than two steps from him, but did nothing to stop the trouble. McMillan died instantly after he fell.

Mrs. McMillan was subjected to a very searching cross-examination, which elicited full details of the friendly intercourse which had existed between the families of the deceased and the defendants, and especially of the intimate relations between Mrs. McMillan and Miss Annie Eanes. Witness stated that in the months of April, May and June, 1879, Annie visited her and remained about a week on each occasion. (According to the theory of the defense, Annie was outraged by McMillan during this visit in June.) Between June, 1879, and January, 1880, the witness and her husband, the deceased, repeatedly urged her to come again, but she always had some excuse. In January, 1880, witness had a particular reason for wanting Annie to come, and it was on the 4th of that month, witness thought, that Annie next came after the visit in the preceding June. McMillan had, without the witness' knowledge, written to Annie that witness wished to see her on particular business; and when Annie came, she did so along with McMillan in the dairy wagon, though witness had not requested him to go after her. She remained until the 8th of the same month of January. Witness was expecting to be confined either about the

15th or the 27th of that month, and wanted to have Annie with her during that emergency. McMillan did not tell witness why he brought Annie so long in advance of the occasion, and when she went away on the 8th he took her to town in the dairy wagon. Witness' baby was born on the 13th, and on the Sunday week following, Annie returned and stayed until the ensuing Tuesday week. Her increased size was then observed by the witness, who, however, imputed it to increasing corpulency until she heard that Annie had been seduced, and then her condition was spoken of by witness and her husband. When Annie left McMillan's the last time, she started to town with Mr. Allen, in the dairy wagon, and took with her the trunk witness let her have. She hesitated about going with Allen, who was a stranger to her, and witness asked McMillan to take her. He replied "Allen ain't going to bite her," but agreed to go, and afterwards said he had overtaken them, and that he and Annie got off the dairy wagon and took a street car, from which one of them got off on the Avenue in Austin and the other on Pecan street. At that time he got money from Hancock, as the witness thought. He told witness that he asked Annie if he should leave her trunk at her uncle's in Austin, and she said for him to leave it at Mrs. Alyea's; but that he told Allen to leave it at the Webb House, opposite Alyea's, as Allen did not know where Alyea lived. Deceased told this to witness before Annie was missed. On Saturday before deceased was killed, Robert Eanes, Sr., the father of the defendants, came and asked witness "where's Annie?" Witness was surprised by the inquiry, and replied that Annie had left witness' house the Tuesday week before. He said she had not gone home. He stayed but a few minutes, and as he stepped to the door witness told him that during the last summer Annie had jestingly said something about running away to get married; to which he replied "it's something deeper than that." He told witness to tell McMillan he wanted him to help find Annie. When McMillan came home witness asked him if he had seen Mr. Eanes, and gave him the message about helping to find Annie. He was very sorry she was missing and seemed much surprised, but, not knowing where she was and having his own business to attend to, he did nothing about seeking her. Witness and deceased never had any altercation with each other about Annie Eanes. Witness had a faint remembrance that Annie, during one of the visits in 1879, asked for the key to the door of the room she occupied, and witness thought she gave her the key, but was not certain whether that occurrence was during the visit in June or in a previous one. Witness thought that Annie slept with her door closed during those visits. Witness and deceased sometimes slept with their door closed, and sometimes with it open; and their bed was so placed that either could get out of it on their respective side. McMillan kept a pistol under the head of a bed which stood in the room into which he and William Eanes went to look at the trunk just before the shooting began.

Re-examined by the State, Mrs. McMillan stated that when her husband was shot she ran out of the house and hallooed "murder," and that when she came back into the house her husband's pistol was under the head of the bed where it was kept. She never saw her husband and Annie Eanes exhibit any undue intimacies, but had seen Maurice Moore kiss Annie, and once saw him try to pull her down on his lap. A man named Mitchell was said to be engaged to marry Annie Eanes. Witness never saw her husband have a letter addressed to Mitchell, nor did he ever assume the name of Mitchell. She never heard of Annie complaining of any treatment towards her on the part of McMillan.

On cross-reëxamination by the defense the witness stated that it was in 1878 and at Maurice Moore's own house she saw him try to pull Annie on his lap, and McMillan as well as witness was present. Witness never observed any difference in the deportment of Maurice Moore towards Annie and towards another sister-in-law.

At the instance of the State, Mrs. McMillan identified three letters written her by Annie Eanes, and dated the 14th and 16th of December, 1879, and the 17th of January, 1880. The tone of these letters was one of cordial friendship, and their only noticeable feature is the expressed and reiterated wish of the writer to come and visit Mrs. McMillan if the latter would come for her. Their only allusion to McMillan is in the last of them, which suggested that her brother Charles would bring her to Mrs. Alyea's in Austin, and from there Mr. McMillan could take her to his house. Mrs. McMillan testified that she talked with many persons immediately after the killing, and told them that the sister of the man who killed her husband was with child, and she supposed that her husband had been killed on suspicion, but she did not think him guilty. Witness knew of no other cause why the defendants should have killed him. Maurice Moore had told her, on Sunday next before the killing, that Annie was seduced, and that it dated back to one of her visits to McMillan's. Moore's expression may have been that the only opportunity for Annie's seduction was on those visits.

In the foregoing version of the very elaborate testimony of the deceased's widow, many matters of detail and explanatory circumstances are omitted.

Dr. Bibb, for the State, testified that he examined McMillan's body on the day he was killed, and found six gun-shot wounds. One of the balls had entered between the breast bone and the navel and passed out at the back. The other five had entered from the rear; one of them penetrated above the left hip, and the others on the right side of the back. The deceased was lying on his face, with the head towards the door entering the house, and the feet near the door between two rooms.

Mr. Phillips, for the State, testified that immediately after McMillan was killed he, the witness, saw the defendant Robert Eanes standing in the street before McMillan's house, and about forty feet from the house. He did not seem to be in any one's custody. Noticing fresh blood on the back of the leg of Robert Eanes' pants, witness asked him if he knew it was there. He looked at it and said he reckoned he got it in the house, and remarked that there was a man killed in there. In reply to witness' inquiries about the killing, Robert Eanes said it was too serious a matter to talk about. Witness was present when the defendants voluntarily surrendered to Maurice Moore; he could not say which of them had the only pistol he saw.

Mrs. C. F. Pearson, a near neighbor of the McMillans, testified that she saw the defendants call twice at McMillan's on the day of the killing. A few minutes after they entered the house at their second call, she heard five shots, and the defendants came out of the house. Each of them had a pistol in hand, and one of the pistols was smoking. The defendant with a heavy beard (William Eanes) was swinging his pistol over his head, and something was said about revenging a woman. He called to a Mr. Hopkins to come on and arrest him, and said he was going to give himself up. He gave his pistol to the other defendant, who had put his own pistol in his pocket. As they came out of the house, they stepped over McMillan's body, which lay about two feet from the front door. Mrs. McMillan was walking the floor; witness heard her halloo "murder," and heard one shot after that. The witness did not then know the defendants. When she saw them make their first call at McMillan's she thought they were kin of Mrs. McMillan, judging by their friendly manner and the cordiality on both sides. The front door was opened after all the shots were fired.

The foregoing, with the three letters of Annie Eanes to Mrs. McMillan, referred to in the latter's testimony, comprises the substance of the evidence on which the case was rested by the State.

Winter Goodloe, testifying for the defense, stated that he had a conversation with Mrs. McMillan when her husband was killed. Replying to witness' inquiry, she told him who did the killing, and witness asked her if she knew the reason they killed him. She replied yes, and said "The fact is, Miss Annie Eanes, a very dear friend of mine, is with child, and my husband is accused of being the father of it;" adding, in substance, that he was killed for that reason.

James Hancock, for the defense, testified that in January and February, 1880, McMillan was in his employ as driver of a milk wagon, and they had some words about McMillan not keeping accounts. McMillan said he had not time to keep accounts, and witness proposed to hire another man to drive alternate weeks with him. He said he was tired of it and he quit. Some days afterwards, witness paid to McMillan, on Congress Avenue in Austin, $11.85 in silver. This payment was made about three or four o'clock in the afternoon of the 28th or 29th of January, 1880, as witness first stated the date; but, being shown his testimony as given at the examining trial, he found that the date there stated was from the 4th to the 6th of February. Witness thought that the payment was made on the same day Annie Eanes left McMillan's house.

Charles Eanes, a brother of the defendants, testified that he and Maurice Moore were out on a surveying expedition from early in October, 1879, until the latter part of January, 1880. Witness saw his sister Annie the first day he got back; but, after she next left home, he did not again see her until Maurice Moore brought her to his house from Round Rock in Williamson county.

On his cross-examination the witness stated that in June, 1879, he was in Bell county, and could not say where Maurice Moore was at that time. Witness heard of the killing of McMillan the day after Maurice Moore brought Annie from Round Rock to his house, and never heard her statement until after McMillan was killed. On the day of the killing witness came to Austin along with Maurice Moore, and saw the defendants in Austin. At that time he did not know but expected that somebody would be killed, and expected it would be McMillan, but neither of the defendants had told him so, and they had no arms so far as he knew. He believed his brother William said that somebody would be hurt before night, and witness thought he knew who, and supposed it would be McMillan,—knowing that his sister had been misled, and had been last seen at McMillan's. Annie Eanes was at Maurice Moore's when McMillan was killed, and both of the defendants then knew she was there.

Re-examined by the defense, the witness stated that near a livery-stable in Austin his brother William told him that if a married man had seduced Annie he would have nothing to do with it, but if it was done by a single man he would make him marry her. This was before any of the Eanes family knew that Annie had been raped.

Robert Eanes, Sr., the father of the defendants and Annie, testified that, late in the year 1878, Mr. McMillan was introduced to him as a gentleman who was going to occupy the place near witness. The friendly relations between the families commenced with the sickness of Mrs. McMillan, and the consequent kindness of witness' family. When the McMillans moved away to the Hancock place, they asked the Eanes family to visit them, and Annie did so in April, May, and June, 1879, and not again until January, 1880. In the interim between June, 1879, and January, 1880, notes inviting her to visit the McMillans were constantly coming, and her mother advised her to do so. When Annie returned home in January, 1880, her mother learned of her pregnant condition, of which the witness had previously had suspicions. About the 10th of February, 1880, witness received, from Mrs. McMillan, the first information that Annie was missing,—that is, information of such a character as convinced him that such was the fact. His son Charles had come after her and had failed to get her, and witness then went to see Mrs. McMillan, who said her husband was out at the Hancock place. Witness asked her where Annie was, and she replied "at home or ought to be." Witness told her No, and that Annie had gone from home, and that he wanted McMillan to help find her. She spoke of a possibility that Annie had run away and married a lover of hers; and witness answered that he thought it was something worse than that, and told her very emphatically to tell Mr. McMillan that witness wanted him to assist in finding Annie. Witness never heard that McMillan took any step to help find her. Annie was delivered of a child on the 12th of March, 1880, and between it and McMillan there is a marked and uncommon resemblance. The eyes are nearly the same in color, the child's laugh is like his, and the expression of its features is the same as his. When Annie was brought home by Maurice Moore her mother was very feeble, and the doctor said that it would kill her to learn of Annie's condition. At witness' request, Maurice Moore went in search of Annie and took her to his own house. Witness had communicated to Moore his suspicions with regard to her condition, and first did so within half an hour after his interview with Mrs. McMillan. Previous to that, witness had told the defendants.

James Mitchell, for the defense, testified that he lived nine miles from Austin, and knew Annie Eanes. He also knew McMillan, and met him late in November, 1879, at the fair grounds near Austin. Witness had received from

McMillan a note of invitation to his house on a previous Sunday evening, when, the note said, a lady friend of witness would be at McMillan's. Witness did not go, and after the fair was over McMillan came to see witness, who expressed regret at his inability to accept the invitation, when McMillan replied that it made no difference, as the lady did not come. Witness asked him who the lady was, and he said "Miss Annie Eanes, of course," and that she would have come but that her mother was sick and had company. After a while McMillan said "You ought to try and see Mrs. Eanes, the old lady." Witness excused himself. McMillan said that Miss Annie had told his wife that she and witness were engaged. Witness did not deny it, and waived the subject with the remark that times were too hard to marry then. McMillan was a stranger to witness, who had seen him but once before they met on the fair grounds. He had then tried to arrange with witness about going on witness' ranche, and that matter was again spoken of at the fair grounds, but no arrangement was made. Witness and Annie Eanes were never engaged. He had addressed her, but she declined him. He had never had sexual knowledge of her, nor ever made to her an insulting or improper proposal. Throughout the neighborhood her reputation was that of a good, honest girl.

On his cross-examination the witness stated that McMillan's only business at the fair grounds was to see him on the subject of Annie Eanes, as McMillan himself said so expressly. Witness thought that McMillan was taking a great interest in him, for a stranger.

Mrs. Alyea, for the defense, testified that she lived opposite the Webb House on Pecan street in Austin. She knew Annie Eanes and remembered the last night Annie stayed at her house. Witness also knew a man who gave his name as McMillan, and who, on three previous occasions, had called at her house to see Annie Eanes. On the fourth occasion, which was on her last stay at witness' house, McMillan was met at the door by witness' little girl. He asked for Annie Eanes, and when she came to the door they talked to each other in so low a tone that witness could not understand what they said, except that, as McMillan started away, he said "I will leave it at the hotel, then, shall I?" And Annie Eanes replied "yes." About eight o'clock the next morning, Annie Eanes left, saying she was going to her uncle's, who lived in another part of town.

Dr. Cummings, for the defense, testifying as an expert, gave it as his opinion that impregnation might result from a rape. On cross-examination, he stated that it was difficult for a man to rape a well-developed woman by mere force, but that the employment of threats in connection with force was a consideration of importance. He and sundry other witnesses testified that Annie Eanes, previous to the occurrences involved in this trial, bore an unquestioned repute as a chaste, modest and truthful girl. He also stated, as did several others, that the character and reputation of the defendants, as peaceable and law-abiding citizens, was always good prior to the killing of McMillan.

Annie Eanes was the next and by far the most important witness for the defendants. Her testimony, omitting immaterial details, was as follows:

"I am twenty years of age. Robert Eanes, Sr., is my father; defendants are my brothers. I first got acquainted with C. D. McMillan at the Murch place near our house, when he and his family moved there. When they moved there Mrs. McMillan was taken very sick; we did all we could for her; we carried the family their food from our house, and nursed Mrs. McMillan and kept her company until she got up, and she seemed feeble for about three weeks. McMillan and family moved from the Murch place to Judge Hancock's place, and I visited the family after they moved. I went first, I think, in April, 1879, and stayed one week; again in May and stayed a week or ten days; and again in June and stayed one week. I next visited the family at another house, in January, 1880. The reason I went in January was, Mrs. McMillan had written often, and would send for me and ask me to meet her in town at Castleman's store; but I had not gone, and then McMillan came after me to my father's house. He came on a Sunday and in a milk wagon. I received a note from him a few days before he came; I did not save it. The note requested me to come to his house and see his wife, and that she requested him to write and tell me she wanted to see me on particular business. I received this note three or four days before he came. The reason I did not go from June to January was because McMillan had treated me in such a disgraceful manner I did not want to be where I would be on any terms with him. This treatment of me had been during my visit to his house in June, and was as follows:

"One night he came into my room about midnight. It was in the house on the Hancock place, where McMillan lived. Mr. and Mrs. McMillan, and their little daughter and I were all that were in the house. I was in a room apart from others. I was asleep, and was awakened first by his catching hold of my hands. I pulled one hand loose and struck him in the face and spoke to him, and he told me not to make any noise, that he would not suffer me to do so, and if I did he would take my life. I then yielded to him. He told me at first he would kill me if I resisted. It scared me very much, and frightened and surprised me. He then had connection with me. After he had accomplished his purpose he told me not to tell any one, and that he would always be prepared to kill my brothers if I told them. My room had two windows and one door; on this night the door had not been locked; next morning I asked Mrs. McMillan for the key and she gave it to me. The reason I did not complain of what McMillan had done was that he had told me he would kill me if I did. I was then nine or ten miles from home and had no means to return home. Next night, I locked my room door; I also closed down the windows. He came into my room again; I don't know how he got in. He came to my bed and insulted and had connection with me as before, threatening me he would take my life if I did not submit, and telling me not to make any noise. There was a child born from the connection he had with me. The child was born on the 12th or 13th of March, 1880; about the middle of the night of the 12th. The connection McMillan had with me took place on the 17th and 18th of June, I think.

"On my January visit at McMillan's I remained only three or four days, and returned about the latter part of January and stayed about eight days. I then knew I was going to become a mother, and McMillan also knew it. When I came away we came to Austin together and stopped at Mrs. Alyea's. We came in Hancock's milk wagon; Mr. Allen driving it. McMillan and I got off the wagon near the Honey church, and got on the street cars. I got off the street car first, at corner of the Avenue and Pecan street, and went immediately to Mrs. Alyea's; and he went on down Pecan street. My trunk was in the milk wagon. I got to Mrs. Alyea's late in the evening; I saw Mr. McMillan that evening at Mrs. Alyea's, and had a conversation with him. He told me that he had the money for me to go off on, and handed it to me, and asked me what he should do about my trunk, which was left at the Webb House. He gave me ten dollars. I went to Round Rock; I went there to stay till the birth of my child. He told me to write to 'Harry Mitchell,' his assumed name. * * * My brother-in-law, Maurice Moore, traced me up and found me at Round Rock. He asked me if I had written to McMillan, and I told him I had written to him once. I went home with Maurice, and to his house, where I met my sister, his wife, and my sister-in-law, William Eanes' wife, and next morning I met my brothers, William and Robert Eanes. Then I told them what McMillan had done to me; I told them all about it. I heard of McMillan's death next night,—the night of the same day. The defendants came home and told me they had killed him. I never told them before what McMillan had done; had never before told any of my family. * * * Maurice Moore never made an insulting or indecent proposition or advance to me in his life. * * * I communicated to McMillan my situation by a note which I gave him on the road, in the wagon, as he was taking me over to his house in January, 1880. * * * My mother and father both urged me to go between June and January; I declined, but did not explain to them why. One reason was because of my mother's condition of health; and McMillan had told me he would be prepared to kill my brothers, and would kill them, if I told them. When I did tell my brothers, I could no longer conceal my situation. During my visit in January at McMillan's, he came to my room door one night at about one o'clock. I rose up in bed and he went out. The room I was then in adjoined Mrs. McMillan's room. The room I was in when he insulted me in June was not adjoining Mrs. McMillan's; in going from her room then to mine one had to pass on to the gallery and then into my room. When I raised up in bed McMillan laughed in a sort of scornful manner and passed out of the room. This was during my first visit in January, 1880. McMillan used other influences to prevent me from telling what he had done to me at the time in June; he told me he would be prepared to kill my brothers if I told them, and would kill me if I did not yield. He further said that, if I said nothing about it, it would come out all right and never be known."

In her cross-examination Miss Eanes stated that McMillan's little daughter Rosa was sleeping with her in June, 1879, when he first came to her room and violated her person. "What occurred," continued the witness, "did not awaken Rosa. McMillan accomplished his purpose by force and threats. The force he used by holding my hands; he had hold of my wrists. I don't know which hand he used. He held both my hands out, each of mine in one of his, stretched out from my body, and held me so until he completed the rape, using his hands in holding mine all the time. I resisted the best I could; I resisted by my strength in every way I could, all the time, but made no noise. He first roused me by catching hold of my wrists. I don't know whether the door was open or shut; can't tell how he got out of the room; did not get up and shut the door. I was twenty years old, last December. I was in good health at the time of the rape. Mrs. McMillan's health at that time was, I think, good. Rosa did not wake up; she was lying in the bed by my side. He spoke in a moderate tone of voice. I did not halloo; I did speak, but used ordinary tone; I don't think it was loud; I only asked who it was. It alarmed me very much; I did not halloo out; I thought who it was at first, and after he spoke I knew. I could not see and did not notice whether he was dressed in ordinary or night clothes; did not notice which way he went out. I turned myself away from him. I got up, I think, at usual time next morning; I lost all that night's sleep. I told no one what had happened. * * * I made no effort to get home next day, or go anywhere else. I did not know any of the neighbors. * * * I had slept in Mrs. McMillan's room before this, on the lounge; don't know why I did not go in and sleep in her room the second night; the lounge was still there. Next day, brother Robert came for me; I said nothing to him about it."

On her re-examination by the defense Miss Eanes stated: "I communicated my situation to McMillan in the wagon on the road from home. He received the note, read it, and tore it up; I informed him of my condition in that note. I told him I could not talk to him; I wanted him to do something for me; I did not want to tell my parents. He said he would do all he could; he proposed that I should go to some place,—I have forgot the name,—I remember it now, New Braunfels; I did not agree; he then proposed I should go to Round Rock, to stay till the child was born. He told me to dispose of it some way and return to father's."

Miss Eanes further testified that the following letter, which was postmarked at Round Rock, February 9, 1880, and addressed to "Mr. Harry Mitchell, Austin, Texas," was written by her to McMillan and intended for him.

"ROUND ROCK, February 9, 1880.

"MR. MITCHELL:

"I write to you to let you know something of my situation. I am at a private boarding house. My board costs me 4 1-2 dollars per week—the cheapest I could get. I will want a good deal more money; at least $14 or $15 more, for washing, Dr.'s bill, and so on. My expense so far, not including board, has been the following: (Here follows several small items amounting to $3.35.) I am troubled to death. Does any of the family—my family I mean—know anything of my being here? For pity's sake, don't let them know it if you can help it. You had better send the money as soon as possible; I might need it. ANNIE M."

The defense also put in evidence a letter dated October 5, 1879, and written to Annie Eanes by Mrs. McMillan. It is replete with expressions of affection and sympathy in general, and especially on account of an injury which the young lady had received in her eyes. A cordial invitation was urgently pressed on the sufferer, in behalf of both the writer and her husband, the deceased, to come and stay with them in order to be convenient to medical attendance. The defense manifestly suspected that the real import of this letter had reference to the pregnant condition of the girl; but Mrs. McMillan, on her cross-examination, positively denied that such was the case, and her testimony implies that, at the date of the letter, she was not aware of the unhappy condition of her correspondent.

The relative situations of the rooms and beds respectively occupied by Miss Eanes and the McMillans in June, 1879, was shown by description and diagram. Miss Eanes slept in a small room cut off of the north end of the gallery extending along the front of the house, and her bed stood in the northwest angle of the room. The McMillans occupied a room which fronted on the gallery at its other extremity, and their bed stood near its southwest corner. There was no contact of the two rooms, and no immediate communication between them, but each was provided with a door which opened upon the gallery, and the traversable distance between the beds was probably about forty feet.

In rebuttal, the State re-examined Mrs. McMillan, who testified that she did not miss her husband from their bed-room during either of the nights in June, 1879, referred to by Miss Eanes, and did not think he could have got out of their bed, absented himself, and returned, without her becoming apprised of it. Witness was not a sound sleeper. If Miss Eanes had talked in her room in an ordinary tone of voice witness could have heard it, as she had heard her little daughter talking in Miss Eanes' room while witness was in her own. Nor did witness observe any change of manner in Miss Eanes during the visit; she always seemed cheerful. There was conflicting evidence as to whether Miss Eanes' baby resembled the deceased.

The defense offered Maurice Moore as a witness, but he was excluded on the State's objection that he was indicted for complicity with the defendants on trial. A serious interruption of the course of proceedings occurred during the concluding argument of the county attorney to the jury. The details of the disturbance are sufficiently given in the opinion of the court.

Walton, Green & Hill, Sheeks & Sneed, and *R. M. Russell,* for the appellants.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. On an indictment for the murder of one C. D. McMillan, alleged to have been committed in Travis county on the 19th day of February, 1880, appellants were tried on the 9th day of July, 1880, in the District Court, and by verdict and judgment were found guilty of murder in the first degree,— the punishment as to William Eanes being affixed at death by hanging, and that of Robert Eanes at imprisonment for life in the State penitentiary.

Over and above its importance on account of the gravity of the penalties imposed, the case involves many interesting features which might, if necessary, open up a wide field for discussion. But in connection with the conclusions which have forced themselves upon our minds with irresistible conviction upon a mature consideration of the record, we propose, in our endeavors to arrive at a true and proper disposition of the case as presented on this appeal, only to discuss those questions which have occurred to us as embracing matters of vital importance to the real issues involved. Preliminary to such discussion it may not be amiss to state briefly, but in substance, the facts essential to the elucidation of these questions.

In the months of November or December, 1878, the deceased and his family moved to the neighborhood of the family of the Eaneses,—that is, of the father of these appellants,—and the two families resided within about one hundred yards of each other for some six weeks or two months. An intimacy soon sprang up between the members of the respective families, which soon ripened into the warmest friendship, especially between Miss Annie Eanes, sister of appellants, and Mrs. McMillan, the wife of deceased; Miss Eanes frequently visiting and staying at the house of McMillan, waiting upon, nursing, and ministering to Mrs. McMillan, who was at the time sick. The friendship thus formed continued after the removal of the McMillans to another place, some ten miles distant, where Miss Eanes, during the months of April, May and June, spent days and weeks at their house. In January, 1880, McMillan came after Miss Eanes and took her from home to his house, on an invitation to pay his wife a visit. About the latter part of January, McMillan came with her in a wagon to the city of Austin, and left her at the house of a friend of hers. Early the next morning she left, saying she was going to an uncle's. On the 10th of February following, her father inquired for her of Mrs. McMillan, and learned for the first time that she was not there, and that she was missing and her whereabouts unknown. Search was immediately made for her, and appears to have been prosecuted without success until the 18th day of February, when her brother-in-law, Maurice Moore, having traced her to Round Rock, found her there, and brought her back with him to his house, on the evening of that day. The next morning she met her two brothers, these appellants, and told them that McMillan had committed a rape upon her, in consequence of which she was about to become a mother. This was the first time she had ever disclosed these circumstances to any of her family. Defendants came to the city of Austin, and about one o'clock went to the house of McMillan, where they met his wife in a friendly manner, and had some conversation with her in regard to their sister, who, they led her to believe, had not yet been found. McMillan was not at home, and they said they wished to see him and left between one and two o'clock, saying they would return. About an hour afterwards they did return, and found McMillan, his wife and little daughter, at table, eating dinner. Wm. Eanes began to talk to McMillan about his sister's not being found, and spoke about a trunk which she had gotten from Mrs. McMillan before her departure. The color and description of the trunk was spoken of, when Mrs. McMillan said there was a trunk in the next room of exactly the same color, and McMillan and William Eanes got up and went into the adjoining room to see it. No word appears to have been spoken after they entered the other room, but almost instantaneously a shot was fired, and McMillan came running back into the room which they had just left, followed by William Eanes, who fired upon him until he fell a lifeless corpse at the feet of his wife. During the shooting neither party spoke. After McMillan fell, the defendants went out of the house, William Eanes pronouncing the single word, "sister."

We have thus briefly endeavored to present the leading features of the testimony as exhibited in the record. Most, if not all the facts, as we have detailed them, are undisputed and uncontradicted. In connection with these facts, the principal question for our determination is the correctness and sufficiency of the charge given by the court to the jury, as the law of the case. No complaint is urged to the charge so far as it relates to murder of the first and second degrees, except as to the manner of stating the rule of reasonable doubt when sought to be applied to the grade of offense; which objection will be noticed hereafter in another connection.

Upon manslaughter the charge is partly an almost literal copy of the several articles 593, 594, 595, 596, 598 and 602 of the Penal Code. The pertinency and relevancy of a charge upon manslaughter was called for by the facts in evidence which are stated above,—one ground, and the chief one, of the defense being that defendants were not, to say the least of it, guilty of any higher crime, their sister having informed them only on the morning before the killing, of the wrong done her by deceased, and the killing having taken place a few hours later, at noon, and upon their first meeting with the deceased after receiving such information.

The general rules with regard to ordinary cases of manslaughter are modified necessarily by our statute in permitting this character of defense. It is expressly provided that "insulting words or conduct of the person killed towards a female relative of the party guilty of the homicide" (Penal Code, art. 597, subdiv. 4) shall be deemed an adequate cause to reduce a homicide from murder to manslaughter. Not only so, but the statute further provides that such cause shall be deemed sufficient if it is made to appear "that the killing took place immediately upon the happening of the insulting conduct or the uttering of the insulting words, *or so soon thereafter as the party killing may meet with the person killed, after having been informed of such insults.*" Penal Code, art. 598. Thus, it will be seen that one of the principal ingredients or elements of ordinary manslaughter, viz.: "that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation" (Penal Code, art. 594), is not applicable to a case where the insulting words or conduct were not indulged in in the presence of the slayer, for he may kill on the first meeting after learning that the provocation, of which he personally knew nothing, had been committed. Up to the time of this first meeting the law prescribes no limit for the subsidence of the passion supposed to be engendered by the information received. If the killing takes place on the first meeting, then it is true in this, as in all other cases, that, in order to reduce the offense to manslaughter, it is necessary, not only that the adequate cause (insulting words and conduct) existed to produce "anger, rage, resentment or terror, in a person of ordinary temper sufficient to render the mind incapable of cool reflection" (Penal Code, art. 594, subdiv. 3), but such state of mind must actually exist at the time of the commission of the offense. Penal Code, art. 602.

In such state of case the material questions to be solved are:

1. Were there insulting words or conduct on the part of the person killed towards a female relative of the slayer?

2. Was that the real cause which provoked and induced the killing?

3. Did the killing take place as soon as the party killing met with the person killed, after having been informed of the insult?

4. At the time of the killing was the slayer laboring under a degree of anger, rage, resentment or terror, such as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection?

If each and all these questions can be answered affirmatively by the jury, then the accused would not, and should not in law, be found guilty of a higher crime than manslaughter. Pertinent and subordinate to, as well as directly and intimately connected with, these leading questions, are others of no less importance which should be explained, so as to be fully comprehended by the jury. As, for instance, that it is not necessary that they, the jury, should know of a verity that the adequate cause which induced the killing existed as a fact, provided that the party killing believed it and acted upon it as such. A mistake may exist and yet the guilt of the accused must depend, in all mistakes of fact, not upon the existence or non-existence of the fact itself, but upon the circumstances as they appeared to and were understood by him.

Again, the jury should not be left in doubt as to the character of passion aroused by the provocation. It may be "anger," or "rage," or "sudden resentment;" not a combination of all. "Anger is a violent passion of the mind excited by a real or supposed injury, or by an injury offered to a relative or friend." It is not necessarily rage, nor transport of passion, nor delirium, though it may be inflamed into such conditions. (Webster's Dictionary.) These are but higher, and more demonstrative and uncontrollable types of its existence. It too often happens that the uneducated mind will confound the cause with the higher degrees, and require that the same external exhibitions shall indicate its presence. Such is not the fact. Anger may exist without any violent ebullition of passion, or even outward expression, and yet to such an extent as to render the mind incapable of cool reflection. It may present all "the torrent's smoothness ere it dash below," and its *indicia* are as varied as are the varied faces and dispositions of men.

Again, it is necessary that the jury should know and understand what, in law, is meant by and designated as "cooling time," — that is, time for the mind to become so calm and sedate, as that it is supposed to contemplate, comprehend, and coolly act with reference to the consequences likely to ensue.

These questions have been so fully and clearly discussed in *Maher* v. *The People*, 10 Mich. 213, and the principles of law governing them enunciated with such clearness and precision, that we cannot better express our views of the law than we find them declared in that opinion. That court, Judge Christiancy delivering the opinion, says: "To what extent the passions must be aroused and the dominion of reason disturbed, to reduce the offense from murder to manslaughter, the cases are by no means agreed; and any rule which would embrace all the cases that have been decided in reference to this point would come very near obliterating, if it did not entirely obliterate, all distinctions between murder and manslaughter in such cases. We must, therefore, endeavor to discover the principle upon which the question is to be determined. It will not do to hold that reason should be entirely dethroned or overpowered by passion so as to destroy intelligent volition. Such a degree of mental disturbance would be equivalent to utter insanity, and, if the result of provocation, would render the perpetrator morally innocent. But the law regards manslaughter as a high grade of offense,—as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured must be considerably short of this and never beyond that degree within which ordinary men have the power, and are therefore morally as well as legally bound, to restrain their passions. It is only on the idea of a violation of this clear duty that the act can be held criminal. * * * The principle involved in the question, and which I think clearly deducible from the majority of well considered cases, would seem to suggest, as the true general rule, that reason should, at the time of the act, be disturbed or obscured by passion to an extent which *might render* ordinary men of fair average disposition *liable* to act rashly or without due deliberation or reflection, and from passion rather than judgment. To the question what shall be considered in law a reasonable or adequate provocation for such a state of mind, so as to give to a homicide committed under its influence the character of manslaughter, on principle the answer as a general rule must be anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them; not such provocation as must, by the laws of the human mind, produce such an effect with the *certainty that physical effects follow from physical causes;* for then the individual could hardly be held morally accountable. Nor, on the other hand, must the provocation in every case be held sufficient or reasonable because such a state of excitement has followed from it; for then, by habitual and long-continued indulgence in evil passions, a bad man might acquire a claim to mitigation which would not be available to better men, and on account of that very wickedness of heart which in itself constitutes an aggravation both in morals and law. In determining whether the provocation is sufficient or reasonable, *ordinary human nature,* or the average of men recognized as men of fair average mind and disposition, should be taken as the standard; unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind, or infirmity of temper, not arising from wickedness of heart or cruelty of disposition. * * *

"The same principles which govern as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter; or, in other words, to the question of 'cooling time.' This, like the provocation itself, must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact whether the injury inflicted by the provocation is more or less permanent or irreparable. The passion excited by a blow in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife;

and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, *in hours or minutes*, can be laid down by the court as a rule of law within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown at all in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular cases, and in a majority of cases is one peculiarly within the province of the jury to determine." See also *State* v. *Holme*, 54 Mo. 154.

We have been led to make this extended extract from *Maher* v. *The People* because, in our opinion, it is the clearest exposition of manslaughter we have seen, and is in perfect harmony with our own views of the proper construction to be given to our own statutes upon the subject.

If the charge of the court in the case at bar is subjected to the test of the principles and rules above enunciated, we are clearly of opinion that it should be held insufficient in law. It instructed the jury that "the provocation which produced the passion must have arisen at the time of the commission of the offense;" which, as we have seen, is not the law where insulting words and conduct are the provocation, and the provocation occurs in the absence of the slayer. It was further calculated to impress upon the minds of the jury that there could be no anger sufficient in law to render the mind incapable of cool reflection, unless evidenced by "sudden transports of passion." And it doubtless misled the jury as to cooling time by not, under the peculiar circumstances of this case, directing their minds specially to the fact whether the killing occurred upon the first meeting after the defendants had been informed of the provocation, and whether the tendency of the provocation at that time was such as would be liable to produce in a person of ordinary temper a degree of anger sufficient to render the mind incapable of cool reflection. The question was not whether there was time to cool from the time their sister informed them in the morning of the wrongs that had been perpetrated upon her, but did the anger exist at the time of the meeting and their acting on the provocation?

In another portion of the charge the following language is used: "I charge you that there is no evidence before you that tends to excuse or justify the homicide, nor is there any evidence before you applicable to what the law calls negligent homicide." We are inclined to the opinion that such a charge, under the peculiar circumstances of this case, if appropriate in any case, was liable to be misconceived by, and to mislead the jury. In *Biggs* v. *State*, 29 Ga. 723, it was held excusable or justifiable homicide for one to kill a party who had ravished his sister,—though not the law in this State. At all events the charge is liable to the construction that, if the jury believed the defendants did kill the deceased, then, in no event, could they find them not guilty, but they must find them guilty of either murder in the first or second degree, or of manslaughter. This a court never has the right to do; it is the province of the jury alone, absolutely, to declare whether the accused is guilty or not guilty. In most instances a court is fully warranted in declining to charge upon a grade of offense, or a phase of case, where there is no evidence supporting it, and thereby withdrawing its consideration from the jury (*Berry* v. *State*, 8 Texas Ct. App. 515); but it is, to say the least of it, of exceedingly questionable propriety, whether in any case a court is ever warranted in telling a jury that there is no evidence of a lower grade where the offense admits of degrees; and that, too, in such manner as that they may feel it their bounden duty to convict anyhow of one of the higher grades.

Again: on the reasonable doubt the court charged the language of the statute, but added "and the rule of reasonable doubt applies to the grade of offense." To the legal mind such a charge would doubtless convey a correct idea and be amply sufficient; but to an ordinary jury it would scarcely apprise them of their duty in considering the degree of offense; that is, if they entertained a reasonable doubt of the higher, to let such doubt operate in determining in favor of the lesser degree. "Oftentimes it is of as great and vital importance to a defendant to have the benefit of whatever reasonable doubt may arise in determining the grade and degree of his crime, as in adjudging the general measure of his guilt." *Murray* v. *State*, 1 Texas Ct. App. 417; *Davis* v. *State*, 10 Ga. 101; 1 Leading Crim. Cas. (Bennett and Heard) pp. 359, 360.

It only remains for us to notice one other matter appearing of record, which in the way of bills of exception, statements, affidavits, and counter-affidavits, covers fifty-five pages of the transcript. During the closing argument of the county attorney, in commenting upon and deducing inferences from the evidence, which for aught that appears he had the right to do, he was interrupted in a very abrupt manner by the excited protestations of Maurice Moore, to whom he was alluding, and who was a brother-in-law of the defendants, and also indicted in a separate indictment as being an accomplice in the murder. Immediately a younger brother of the defendants rushed upon and struck the county attorney, whilst both defendants attempted to join in the melee, and one of them seized a chair and attempted also to strike with it. Excitement naturally rose instantly to the very highest pitch, and was participated in by the one hundred and fifty or two hundred spectators, who were present in the court room. The proceedings of the trial were stopped, and for a few moments the wildest confusion seems to have prevailed. Moore was ordered to jail by the court, and was taken out by the sheriff. Silence and order were commanded by the officers of the court. After order and quiet were restored, the court ordered the county attorney to proceed with his argument, and he requested the court, before proceeding, to have the prisoners removed from his rear, remarking that he did not wish to be assassinated. Defendants were removed and counsel resumed his argument under much excitement. He said "he might be assassinated before he got through, but before he would be intimidated by Maurice Moore, in the discharge of his duty, he would see him dead and in hell and follow him there." At this remark the audience inside and outside the bar applauded by clapping their hands, stamping their feet, and by loud and vociferous cheers of approval. The proceedings of the trial were stopped and there was again great confusion and excitement for some moments. When order was again partially restored the court censured the audience, and remarked that "if the parties causing this disturbance could be identified they should be fined to the extent of the power of the court," and that he "felt ashamed, mortified and humiliated, that such a thing should occur while men were on trial for life." In resuming, the county attorney again spoke of defendants and their attempt to assassinate him in the court house, to which the defendants through counsel objected, when the court made some remark about the latitude which would be allowed counsel for the State, the substance of which remark is not agreed upon in the two bills of exception. Finally the court told the county attorney that he must confine himself to the evidence.

The rule seems to be now well settled in practice that, "where the counsel grossly abuses his privilege to the manifest prejudice of the opposing party, it is the *duty* of the court to stop him there and then. If he fails to do so and the impropriety is gross, it is good ground for a new trial." *Jenkins* v. *N. C. Ore Dressing Co.* 65 N. C.

563; *Thompson* v. *State*, 43 Texas, 268; *Hatch* v. *State*, 8 Texas Ct. App. 418; *House* v. *State*, 9 Texas Ct. App. 567; *State* v. *Smith*, 1 Amer. Crim. R. (Hawley) 580; *Ferguson* v. *State*, id. 582.

Such occurrences in the court house and during a trial for murder must of necessity have their influences upon the jury. Amidst such excitement it is scarcely to be imagined that they would be able to maintain that quiet, calm disposition and frame of mind which should never be diverted from, or for a moment lose sight of the grave and solemn issues they were called to decide. But these appellants and their relatives and friends were the primary cause of all that subsequently occurred. It would be a most dangerous precedent, and one I shall never be willing to sanction, that prisoners on trial for a felony may, by their own unjustifiable and outrageous conduct, by openly violating the law, and assaulting her officers in the very sanctuary of justice, create a state of circumstances which may have operated to prejudice their rights, and afterwards seek advantage of their own wrong and claim immunity from punishment because in all probability the extent of the punishment might have been affected, if it was not in fact superinduced, by these untoward circumstances. To allow them to do so would simply be to invite a recurrence of such acts and scenes in any and every case where a party was placed upon trial for felony and might not be willing to abide the result.

Such questions, however, should never be brought to this court for revision and adjudication, when, if the proper course is taken, they may be disposed of so promptly, and with so little trouble, in the court below. No effort should have been made to proceed with the trial during the pendency of the excitement. So soon as it reasonably became apparent that there was a disturbance, or the likelihood of one, which might affect the quiet of the trial and perhaps influence its result, if unable to restrain it on the moment, the court of its own motion should have arrested the proceedings and postponed the trial until all such excitement had been entirely allayed, even if it should take days to do so, having in the meantime made all necessary preparation to enforce and maintain proper order and decorum upon the resumption of and during the subsequent progress of the trial. Had the court promptly pursued this plan much of the disturbance and outrageous conduct complained of would doubtless never have occurred.

The judgment of the lower court is reversed and the cause remanded for a new trial.

Reversed and remanded.

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WILLIAM ROSS AND ALONZO ROSS v. THE STATE.

1. PRACTICE — CHARGE OF THE COURT. — If the court assumes and charges on a theory not raised or indicated by the evidence, it is radical error, and fatal to a conviction.
2. ARREST WITHOUT WARRANT is authorized by statute when, (1), the offense being a felony, or an offense against the public peace, it is committed in the presence or view of the officer; (2), when the offense, being a felony or breach of the peace, is committed in the presence or view of a magistrate, and he verbally orders the officer to arrest; and (3), when it is shown by satisfactory proof to the peace officer, by the representation of a credible person, that a felony has been committed, and that the offender is about to escape so that there is no time to procure a warrant.
3. SAME — MANSLAUGHTER. — An attempted unlawful arrest is deemed in law a provocation sufficient to reduce a killing in resisting it from murder to manslaughter.
4. SAME — EXCUSABLE HOMICIDE. — The citizen is authorized to stand upon his individual right, to oppose force to force in the prevention of an attempted wrong, and when he is threatened with unlawful arrest, he may not only use force, but can increase that force even to the killing of his adversary, if necessary to prevent the attempted wrong, and be held excusable. See the opinion *in extenso* on the subject.

5. HOMICIDE IN DEFENSE OF PROPERTY.— If a trespasser, unarmed, attempts a trespass upon the property of another, and neither intends nor attempts to commit a felony or inflict serious bodily harm, if the owner in resisting kills the trespasser unnecessarily and with a deadly weapon, he is guilty of murder.
6. SAME.— But if the trespasser is armed and attempts to take the property by force, and manifestly intends to take the life of the owner if necessary to acquire possession of the property, his killing by the owner will be held to be excusable self-defense. See the opinion *in extenso* on the question.
7. SAME.— The general principle is that when one's person or property is unlawfully assailed, he is not required to yield in the least, but in all cases may stand upon his rights, taking care not to resort to greater violence than is necessary for their protection.
8. HOMICIDE IN DEFENSE OF ANOTHER.— To the same extent as he who is threatened with violence to his person or property, his brother may, in his behalf, resist the execution of the unlawful purpose. *Alford* v. *State*, 8 Texas Ct. App. 545, cited and approved.
9. EVIDENCE.— See the opinion for evidence in this case *held* insufficient to sustain a conviction for murder in the second degree.

APPEAL from the District Court of Williamson. Tried below before the Hon. W. A. BLACKBURN.

The defendants were indicted for the murder of A. G. Hall, marshal of the town of Round Rock, Williamson county, on the 26th day of March, 1878. Their trial, at the January, 1881, term of the District Court, resulted in their conviction of murder of the second degree, with punishment of each affixed at five years in the penitentiary. The opinion sets out the material evidence in detail.

Makemson, Fisher & Price, for the appellants.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellants were tried for and convicted of the murder of A. G. Hall, and their punishment was assessed at confinement in the penitentiary for the term of five years.

We will give all of the evidence, in the language of the witnesses, bearing directly upon the homicide. This, we think, is necessary to a proper understanding of the legal principles which we think apply to the case.

A. W. Crosby testified for the State: "I knew A. G. Hall. He is dead. He was shot in Round Rock, Williamson county, Texas, about the latter part of March, 1878. He was marshal of the town of Round Rock at the time he was shot. I saw a part of the difficulty in which A. G. Hall was shot. It occurred across the street from my place of business, in front of what was then known as the 'Blind Tiger Saloon.' Quite a crowd was there, talking loud and making some disturbance. A. G. Hall came down the street to where the crowd was, and I walked across the street from my store to a point near the crowd; and as I walked up, I saw a man come out of the door of the 'Blind Tiger' with a gun in his hand. Hall was talking with this man. As the man came out of the door with the gun he brought the gun in a presented position, in both hands. Hall's back was towards the street, and he seemed to be watching the man in front of him with the gun. About this time I noticed a man who had leggings on move out in the street behind Hall. This man who had leggings on drew a nickel-plated six-shooter from his leggings and moved up in the rear of Hall, and, as I thought a difficulty was coming on, I went into a house near by, and immediately after I got in the house the firing began. I think that the man who drew the six-shooter from his leggings was the defendant Lon. Ross."

James Pickle, for the State, testified: "I was in Round Rock the day that A. G. Hall was shot, and saw the difficulty. I saw the defendants, William and Alonzo Ross, there in front of the 'Blind Tiger' at the time of the difficulty. William Ross had a Winchester gun, and Alonzo had a six-shooter. Quite a crowd was there.

Hall came up and ordered the crowd to disperse, and asked who was selling whiskey there, saying that he would find out if he had to break into the 'Blind Tiger.' After talking some time about the 'Blind Tiger,' he turned to the defendant William Ross, and said 'put up your gun.' William Ross replied: 'I have no place to put it; I am a stranger, and am waiting for my company to get ready, when we will leave town.' Hall then said, 'put it up,' and Ross asked if there was any law against carrying a gun. Lancaster then said 'I'll take the gun,' and Ross, reaching the gun towards him, asked, as Lancaster reached for it, 'will that do?' Hall reached for the gun at the same time, and Alonzo Ross pushed the defendant William Ross back, saying: 'Don't give up your gun, there is no law for it.' Hall drew his pistol, and it fired, striking a boy, who was sitting down in the street holding horses, in the leg. At this time William Ross was out in the street near the sidewalk, at the same point where he stood when Hall told him to put up the gun. Hall was on the sidewalk, and Alonzo Ross was to the left of William Ross, and to the right of Hall. Alonzo Ross drew his pistol from his boot and fired. This shot was fired immediately after that fired by Hall. The shot struck Hall, and I saw his arm fall as Alonzo Ross' pistol was discharged."

Cross-examined the witness testified: "At the time Hall ordered William Ross to put up his gun, defendants were quiet, and making no disturbance. A man in the crowd by the name of Clark was making a good deal of noise. Hall seemed to be considerably under the influence of whiskey. I did not see Alonzo Ross' pistol until after Hall had drawn his."

J. W. Barlow testified for the State: "I was coming down the street in Round Rock the day that A. G. Hall was shot, and came up to Hall on the sidewalk about seventy-five yards from the 'Blind Tiger.' There was a crowd in front of the 'Blind Tiger,' and much loud talking, and Hall said that he would go down and quiet it. Hall and I walked down the street to where the crowd was gathered, and Hall said something about the 'Blind Tiger.' A man came out of the door with a gun in his hands, the firing commenced, and I got away."

B. J. Swenson, for the State, testified: "I know the defendants William and Alonzo Ross. I saw them in Round Rock on the day that A. G. Hall was shot. They came to my shop about ten or eleven o'clock in the morning, and said that they wanted to get a horse shod. Both of them wore leggings, one having on a hairy pair and the other a leather pair. They hitched their horses at my shop, and put their things, leggings, and baggage in my shop. My help and I went to dinner, and when we came back the defendants' horses and baggage were gone. When the defendants left my shop before dinner, one of them took his gun with him. It was late in the evening when the shooting occurred. I had gone home from my shop, after sundown. Immediately after the shooting, I saw the same defendant who took the gun away from the shop that morning run past my house with the gun."

Albert Higlesmith, for the State, testified: "I know A. G. Hall, and was in Round Rock the evening he was shot. At the time of the shooting I was about seventy-five yards from the place of shooting. There was a crowd of men in front of the 'Blind Tiger,' and several horses were standing between the crowd and myself, held by a young man. I could not see what was going on in the crowd. After several shots were fired, I think at the third shot, the man holding the horses fell. He was near the Steinbock corner, up the street from the 'Blind Tiger,' and between the crowd and me. After the firing began and the crowd dispersed, I saw A. G. Hall walk up the street, a few steps, and sit down on a box, saying he was shot. After Hall sat down on the box, I noticed a man running diagonally across the street, who fired three shots from a gun at Hall as he sat on the box. This man had on leggings. A. G. Hall was sober at the time; had not been drinking for several months. It is about sixty feet from Steinbock's corner to the front of the 'Blind Tiger.'"

J. W. Holt testified for the defendants: "I know the defendants William and Alonzo Ross. I reside in Colorado county, Texas. I was in Round Rock the day that the difficulty occurred between the defendants and A. G. Hall. It took place in front of the 'Blind Tiger' saloon. I was standing in ten or fifteen feet of the place of the difficulty, at the time it occurred. When Hall came up to the crowd he said something about breaking into the 'Blind Tiger,' and he and a man called Lancaster had some conversation about it. Hall then turned to the defendant Wm. Ross, who was standing in the street near the sidewalk with his gun in his hand—Hall standing on the sidewalk facing him—and said to Wm. Ross, 'put up that gun' or 'give up that gun.' Wm. Ross said: 'I am a stranger here, Captain, and don't know where to put it, and am just waiting for my company to get ready, when I will leave town.' Hall then said in an abrupt, positive manner, 'give up that gun.' Wm. Ross asked, 'is there any law against carrying a gun?' and Hall answered 'I command you to put up that gun.' Lancaster stepped up and told Wm. Ross to give up the gun. Wm. Ross reached the gun towards Lancaster, saying: 'Will that do, Captain?' and Hall reached towards the gun to take it. At this time defendant Alonzo Ross stepped up to Wm. Ross and pushed him back, saying to Wm. Ross 'Don't give up your gun, you have violated no law.' Captain Hall then drew his pistol, and it fired in the direction of Wm. Ross. I saw the flash of the pistol when it fired, and it seemed to be considerably depressed. At the time Hall's pistol fired, he was on the sidewalk, near the outer edge facing towards the street. Wm. Ross was standing in the street in front of Hall, and about four or five feet from Hall. Alonzo Ross was a few feet to Hall's right. The shot from Hall's pistol hit Moram, who was standing out in the street holding some horses. I thought Hall shot Wm. Ross. It was getting dark at the time the shooting occurred. If Alonzo Ross drew his pistol before Hall's pistol fired, I did not see it. Hall's manner towards defendants was abrupt and harsh. At the time Hall accosted Wm. Ross, the defendants were creating no disturbance. At the time that Hall came down to the crowd a man named Clark was there, talking loud and making noise, but he left soon after Hall came. The defendants were strangers in Round Rock. Hall seemed to be drinking considerably. I was never in Round Rock until that day. I left as soon as the shooting began, and saw no more of the difficulty. I saw Alonzo Ross the next day at the house of my brother-in-law, seven or eight miles from Round Rock. He was shot in the shoulder. At the time Hall drew his pistol and fired, I thought he was shooting at Wm. Ross."

John Moram for the defense testified: "I know defendants, Wm. and Alonzo Ross, and was in Round Rock on the day of the difficulty between them and A. G. Hall. When the shooting began I was standing in the street near Steinbock's corner, about ten feet from the sidewalk, holding some horses. Myself and defendants were waiting for Ben Sander, who was in Steinbock's store, when we were all going out of town together. When Hall came to the crowd in front of the 'Blind Tiger,' he said something about selling whiskey, and breaking into the 'Blind Tiger.' He and Lancaster had some conversation. Hall then turned to defendant Wm. Ross, and asked, 'What are you doing with that gun?' William Ross answered, 'I am doing nothing with it.' Hall then said, 'put it up.' Ross replied, 'I am a stranger, and we are just ready to leave town.' Hall said, 'give up the gun.'

Lancaster said 'I'll take it,' and Wm. Ross asked Hall, 'will that do?' and reached the gun towards Lancaster. Hall reached out to take the gun, when Alonzo Ross stepped up and pushed Hall back with one hand and Wm. Ross with the other, saying to Wm. Ross: 'Bill, don't give up your gun — there is no law for it.' Hall then drew his pistol and it fired, hitting me in the thigh, breaking the bone. At the time Hall accosted Wm. Ross about the gun, Ross was standing in the street near the sidewalk with his gun in his hand, muzzle down, resting on his foot. I think Hall was standing on the sidewalk facing the street. Alonzo Ross was below Hall and Wm. Ross, and I was fifteen or twenty feet from them up the street towards Steinbock's corner. Defendants were making no disturbance when Hall accosted them. If Alonzo Ross had his pistol out before Hall's pistol fired, I did not see it. I think I could have seen it, if he had drawn it before. It was late in the evening — getting dark — at the time of the difficulty. The defendants were strangers in Round Rock, and had reached there only that day. Defendants lived in Bell county."

As applicable to these facts, the learned judge who presided at the trial below deemed it proper to give in charge to the jury the law relative to homicide committed to prevent arrests. Assuming (as did the learned judge below) that the case as made by the facts required such a charge, we will first notice the legal principles applicable thereto. 1st. If the homicide was committed in order to prevent a legal arrest, the charge upon that subject is not so objectionable. But if there be no evidence tending to show that the arrest was legal, a charge based upon that theory (in this case) is very obnoxious. While it is true that the charge should apply the law to every phase of the case, in some cases, and we think this is one, to assume a theory not raised or indicated by evidence and charge thereon would be very injurious to the rights of the defendant.

The deceased having no warrant for the arrest of either of these defendants, had he the right to arrest them or either of them without a warrant?

The right to arrest without warrant is derived from arts. 1047, 1048 and 1050, Code of Criminal Procedure. Under the first, if the offense be a felony, or an offense against the public peace, and is committed in the presence or view of the officer, he can arrest without warrant. Under the second, if a felony or breach of the peace is committed in the presence or in the view of a magistrate, and the magistrate verbally orders the arrest, a warrant is not required. And by the third, when it is shown by satisfactory proof to the peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the person accused. If the authority in this case to arrest without warrant can be found at all, we must look to art. 1047.

And looking there we find that the person sought to be arrested must have committed a felony or an offense against the public peace, in the presence or view of the officer. After a close, yea, thorough examination of the evidence, we have been unable to discover the slightest circumstance tending to prove the commission of any offense by either of these defendants, in the presence or view of the officer, Hall, or at any other place. This being the case, that part of the charge based upon a supposed breach of the peace by these defendants is assuming, and is clearly calculated to impress the mind of the jury with the belief, that an offense had been committed by these defendants or one of them; and that therefore the officer, Hall, had the right to arrest them.

Hall, the deceased, having no right to arrest the defendants or either of them, what were the legal rights of the defendants, if, in preventing this illegal arrest, they or either of them slew him? We think these are the correct rules:

1. The law of self-defense justifies the repelling of force by force in such cases, even unto death, but does not justify wanton or unnecessary aggression. If a person, in resisting an illegal arrest, makes use of a deadly and unnecessarily dangerous weapon, and with it slays his adversary, the crime is not, because of the use of a deadly weapon, or because the force used is greater or more violent than was required, raised above the grade of manslaughter. For the value the law sets upon the liberty of the citizen is so high that an attempt to arrest him unlawfully is regarded a great provocation, such as will reduce the killing to manslaughter. This principle is now well established. See the following cases: *Rex* v. *Curvan,* 1 Moody C. C. 132; *Roberts* v. *State,* 14 Mo. 146; *Com.* v. *Cary,* 12 Cush. 246; *Tackett* v. *State,* 3 Yerger, 392; *Galvin* v. *State,* 6 Cold. (Tenn.) 291; *Alford* v. *State,* 8 Texas Ct. App. 545.

2. As the law, divine and human, gives the citizen the right to stand upon his individual rights, and use force against force to successfully prevent the attempted wrong, the citizen whose liberty is thus unlawfully assailed can not only use force, but can increase that force and continue to increase it even to the death if necessary to prevent the attempted wrong, and if he slay his adversary he will be held excused. Otherwise, the lawless aggressor, the vindictive oppressor will be permitted to triumph over the rights and liberties of the citizen. Right will be made to do homage to wrong, and look to future redress in the courts of the country. This is not American law. The citizen has the right to maintain his liberty at all hazards, against any and all persons who attempt to invade it unlawfully, taking care not rashly to use or resort to greater violence than is necessary to its protection. Again, being in the right, he is permitted to anticipate the aggressor and prepare himself by drawing a weapon,

or making any other preparations, and if his life is imperiled or he is in danger of serious bodily harm, to use every means in the defense of his person or liberty. He is not required to permit his assailant to take the lead, and thereby give him the advantage, but, if the surroundings indicate a resort to a serious or deadly conflict on the part of the adversary, he can prepare to meet it, and if the adversary makes demonstration upon his life or liberty, or shows an intent to inflict serious bodily harm upon him, he can kill him and be held blameless by the law of the land.

The evidence in this case, we think, requires of us a statement of the law applicable to a defense against trespasses upon property; for, if the defendants or either of them had committed no offense and were not subject to an arrest, the deceased had no right to take the gun of William Ross from him, and when he attempted to do so, he became and was a trespasser upon his property. This being the case, what were the rights of the defendant?

It is stated in the books that there is a difference in the law applicable to a defense against an unlawful arrest, and that applicable to a defense against trespasses against property; and that the difference consists in this:

"If a person resisting a trespass upon his property makes use of a *deadly* weapon, and with it kills the trespasser, it is murder, while in the other case it is ordinarily but manslaughter; but although a person resisting an illegal arrest makes use of a deadly weapon, and with it slays his adversary, the crime is not, because of the use of such deadly weapon, raised above the degree of manslaughter." The principle above enunciated, we without hesitation approve, with the proper explanation and modification. If the trespasser were unarmed, and simply attempts the trespass without force of arms, and neither intends nor endeavors to commit a felony nor to inflict serious bodily harm upon the owner in case he resisted, to kill with a deadly weapon is, and in justice should be deemed murder.

But, suppose he is armed and attempts to take the property by force, and in order to be successful intends manifestly to kill the owner of the property, if necessary to accomplish his purpose, and is killed by the owner or any other person, this would be excusable self-defense. And although there was no intention to steal or rob, and therefore no felony in respect of the property, yet, as the intent was to kill the owner if necessary to accomplish the purpose, the felony would consist in the intention and attempt to kill the owner. Then, again, we find that in the protection of his property the citizen has the right to oppose force to force, and, if necessary to prevent the trespass, to take the life of the aggressor. The principle is this: When his person or property is assailed, he is not required to yield in the least, but in all cases may stand upon his rights, taking care not to resort to a greater degree of violence than is necessary to their protection. For, if the law will permit him to oppose slight force to slight force, why not the greatest violence if necessary to the protection of those rights? A contrary rule leads to a denial of the right in any case; for, if he can only go so far, and then yield to the aggressor, logic and common sense require that he should have yielded at the first. *Payne's Case*, Horr. & Thomp. Self Def. 863 and 900, note 1; *The People* v. *Herbert*, 24 Wend. 369; *Curtis* v. *Herbert*, 1 Hill (S. C.), 336; 4 Hill, 437.

We do not think that these principles were applied to the case by the court below in its charge to the jury. As to the right of Alonzo Ross to act in the protection of the life, liberty and property of his brother William, there can be no question. He, to the same extent that William, could oppose force to force, and, if required to prevent the accomplishment of the unlawful purpose, take the life of the assailant. (See this question ably and exhaustively discussed by Judge Clark in the Alford case, 8 Texas Ct. App. 545.)

The defendants were convicted of murder in the second degree. This conviction, and the judgment thereon, are not supported by the evidence. Horr. & Thompson Self. Def. p. 717.

The other points raised by counsel in their very able brief will not be discussed, believing that the principles above stated, if properly applied, will suffice.

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

SIM TRAMMELL *v.* THE STATE.

1. EVIDENCE — IMPEACHING WITNESS.— Failure to qualify as a witness with regard to the general reputation of another witness in the neighborhood for truth and veracity, the impeaching witness was properly held incompetent.
2. SAME — PRACTICE.— But during his preliminary examination as to his means of knowledge, the witness stated that the reputation of another witness was bad. *Held*, that the court erred in refusing to withdraw the statement from the jury, or to instruct the jury to disregard this statement of the proposed impeaching witness.

APPEAL from the District Court of Limestone. Tried below before the Hon. L. D. BRADLEY.

The indictment charged an assault with intent to murder J. D. House. The verdict assessed the punishment at two years in the penitentiary. The question upon which the judgment is reversed requires no statement of the facts of the case.

M. D. Herring, W. H. Frisbie, B. M. Barron and *L. B. Cobb*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Having failed to qualify himself as a witness with regard to the general reputation of defendant's witness, Betsy Rusk, for truth, in the neighborhood in which she lived, the court very properly held that the impeaching witness, Stephens, was incompetent to testify. *Holbert* v. *State*, 9 Texas Ct. App. 219. But during this preliminary examination touching his means of knowledge and qualification to impeach, Stephens had stated that Betsy Rusk's reputation for truth and veracity was, in his opinion, bad. After he was held incompetent by the court, defendant's counsel requested that the court would exclude from the jury such statements as Stephens had made about the witness' reputation being bad. This, in our opinion, the court should have done. The jury should have been instructed to disregard the entire testimony of the witness on the subject.

To permit him to express his opinion as to her reputation, or, rather, to permit such evidence to remain before the jury, was the same in effect as if the witness had been held competent and permitted to testify on that point. The witness could not in any manner have qualified himself to give his individual opinion, independent of the general reputation. Exception was taken at the time to the refusal of the court to withdraw these statements of the incompetent witness, and an instruction directly covering the point was requested by defendant's counsel and refused by the court. It is not necessary to discuss any of the other supposed errors, as they are not considered tenable.

Because of the error stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

MIKE GALLAGHER v. THE STATE.

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1. ILLEGAL VOTING.—INDICTMENT for illegal voting need not allege the specific authority for the election at which the illegal vote was cast; nor the authority of the officers; nor the names of the candidates.
2. SAME.—That the election was "held and authorized by law within and for the city of W." sufficiently states the place of voting, and that the "vote was for city attorney and other officers then and there to be chosen at said election" sufficiently charges the purpose for which the election was held.
3. SAME.—Averment that the accused voted at an election authorized by law then and there holden, includes the further idea that it was held by the proper officers.
4. JUDICIAL COGNIZANCE.—That corporations are authorized by law to hold elections for city attorney and other officers, is a fact within the judicial knowledge of this court.
5. INDICTMENT.—Authorities conflict as to whether or not an indictment for illegal voting must aver the particular disability; but *held*, that the averment of the disability is the better and safer practice.
6. SAME.—The word "convicted" has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused.

APPEAL from the District Court of Parker. Tried below before the Hon. G. A. MCCALL, Special Judge.

The indictment charged that the appellant, having been convicted of burglary and thereby disqualified, knowing his disqualification, did vote at a certain election, etc., contrary to the statute, etc. Art. 165, Penal Code. His trial resulted in his conviction, with his punishment assessed at three years and six months in the penitentiary.

J. N. Haney, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The indictment in this case was brought under a statute which reads, "If any person knowing himself not to be a qualified voter shall at any election vote or offer to vote for any officer then to be chosen, he shall be punished by confinement in the penitentiary not less than two nor more than five years." Penal Code, art. 165. After the formal parts the charge is thus set forth, viz.: "That Mike Gallagher, late of said county, on the 5th day of April, A. D. one thousand eight hundred and eighty-one, and in said county and State of Texas, did then and there unlawfully and feloniously, at an election then and there held and authorized by law, within and for the corporation of the city of Weatherford, vote for city attorney and other officers then and there to be chosen at said election; he the said Mike Gallagher not then and there being a qualified voter at said election, for that he had been by the District Court of Dallas county, State of Texas, convicted in said court of the crime of burglary, and by said court sentenced to the State penitentiary for the term of two years,— all of which the said Mike Gallagher did well know, and he the said Mike Gallagher did then and there know himself not to be a qualified voter under the laws of the State of Texas at said election; contrary," etc.

Defendant filed a motion to quash upon the following grounds:

"1st. Said indictment fails to allege or charge what the alleged election was held for.

"2d. Said indictment fails to allege an offense in plain intelligible language, so as to enable defendant to determine for what he is being held and tried.

"3d. The indictment fails to show and allege defendant's disqualification in this, that it fails to allege any final judgment of a court of competent jurisdiction, and fails to allege that any final trial or judgment was had or entered against defendant."

An inspection of the indictment shows the futility of the first two grounds. The authority of the election was not necessary to be averred (*State* v. *Hayworth*, 3 Sneed, 64; *State* v. *Marshall,* 45 N. H. 281), nor the authority of the officers (*State* v. *Rundels,* 7 Humph. 9; *People* v. *Cook,* 8 N. Y. 69), nor the names of the candidates (*State* v. *Minnick,* 15 Iowa, 123). It is alleged that the election was "held and authorized by law within and for the corporation of the city of Weatherford," which sufficiently stated the place of voting; and that the vote was "for city attorney and other officers then and there to be chosen at said election" clearly shows for what purpose said election was held. *Hoskey* v. *State,* 9 Texas Ct. App. 202. In a word, "the indictment charges where the election was held, what officers were then to be elected and that such election was authorized by law. * * * Any other or further averment in this respect was unnecessary. To say that defendant voted at an election authorized by law then and there holden includes the further idea that it was held by the proper officers." *State* v. *Douglass,* 7 Iowa, 41. This court judicially knows that corporations are authorized by law to hold elections for city attorney as well as other municipal officers. Rev. Stats. arts. 344, 345.

With regard to the 3d objection, that the indictment fails to set out with certainty and sufficiency the disability under which defendant was laboring, it is to be noted that in several of the States, under statutes similar to ours above quoted, it has been held unnecessary to aver the particular disability. *The Comm.* v. *Shaw,* 7 Met. 52; *State* v. *Marshall,* 45 N. H. 281; *U. S.* v. *Quinn,* 12 Int. Rev. Dec. 151.

In Douglass' case, 7 Iowa, 41, it was said, "the essence of the offense in this case is that the defendant voted knowing he was disqualified. Under it any disability might be shown; or the State might prove from the admissions of the defendant, or otherwise, that he knew he was disqualified and was in fact disqualified, without proving in what the disqualification consisted." In New

Jersey and Tennessee, however, it has been held that "the particular disability must be specified." *State* v. *Moore*, 3 Dutch. 105; *State* v. *Tweed*, 3 Dutch. 111; *Pearce* v. *State*, 1 Sneed, 637; 2 Whart. Precedents and Pleas (3d ed.), § 1019, and note.

We are of opinion the better and safer practice is to set out the particular disability. The disability alleged was conviction for the crime of burglary. The word "convicted" used by the pleader has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused. Penal Code, art. 27; 1 Bouv. L. Dic. word "Conviction."

To say that a party had been "convicted" and then add that he stood his final trial and that "judgment final" was rendered against him would be tautology. Moreover, the word "convicted" is the proper statutory word to convey the idea that a party is disqualified from voting because he has been tried and condemned for a felony. In the chapter on suffrage it is declared that "the following classes of persons shall not be allowed to vote, to wit, * * * 3. All persons *convicted* of any felony." Rev. Stats. art. 1687. And precisely the same language is used in the Constitution on the same subject. Const. art. VI, subdivision fourth, sec. 1.

We are of opinion that the third ground of the motion to quash was likewise untenable, and that the court did not err in overruling the motion to quash the indictment nor the motion in arrest of judgment, this last motion being substantially based upon the same grounds as the motion to quash. We fail to see any such error in the proceedings of the trial exhibited in the record as requires a reversal of the judgment, and the judgment is therefore affirmed.

Affirmed.

HUGH COPENEY *v.* THE STATE.

1. PRACTICE — BILLS OF EXCEPTION.— On the trial of an accused charged with theft of a mare, a witness for the defendant was asked if he did not direct the accused to go and get the mare and bring her to him; which question was objected to by the State on the ground that the "witness had no right to direct the accused to steal the mare." When the objection was interposed the trial judge asked defendant's counsel: "Do you propose to prove that witness directed him to steal the mare?" The question to the witness was excluded, and to its exclusion an exception was taken, but no exception was then taken to the remark of the judge, though after conviction it was embodied in a bill of exceptions, and was assigned for error. *Held,* that such matters should be saved by exceptions properly taken at the time, otherwise this court will not reverse unless it be apparent that the accused was injured by the remark of the judge.
2. PRACTICE.— It is objectionable practice for a trial judge, in passing upon any question of law arising in a case, to make any remarks or inquiries, in the hearing of the jury, which might appear to be the expression of an opinion as to the facts.

APPEAL from the District Court of Colorado. Tried below before the Hon. EVERETT LEWIS.

A statement of facts is not necessary to an understanding of the opinion.

W. S. Delaney, for appellant.

Horace Chilton, Assistant Attorney General, for the State

WHITE, P. J. If the State's witnesses were to be believed there is no question of defendant's guilt — whether he was induced to retake the mare by Hines or not, and it made no difference if he took her for the purpose of securing Hines in case the latter should have to pay Mathews the price defendant agreed to pay the latter for her, and for which it is claimed Hines was security. If the defendant had sold her to Howard or traded her to him, no supposed claim of Hines could justify him in stealing her from Howard in order to relieve Hines of his suretyship.

But there is, in addition to the direct and positive testimony, evidence of a negative character which totally deprives defendant of any show, even the slightest, of honesty of intention in the transaction. Though admitting that he took the mare to secure Hines, it seems never to have occurred to him that he should also have returned the horse and bridle to Howard, which the latter had given him in exchange for the mare. To have given to his conduct the semblance of honesty, he should have returned or proffered to return this horse and bridle also. This he did not do, and Howard testifies that he has never seen his horse and bridle since he made the trade with him.

There is but one matter apparent of record which calls for consideration, and that is a remark of the judge, which, though not excepted to at the time, is made to appear in the 3d bill of exceptions afterwards reserved by defendant's counsel. When defendant's witness Hines was being examined in chief, counsel "proposed to prove by him that before the night of the taking he had directed the defendant to go after the mare and bring her back to him, and defendant did so. State's counsel objected on the ground that witness had no right to direct defendant to steal the mare." When this objection was raised, the court asked defendant's counsel, "Do you propose to prove that witness directed him to steal the mare?" From the juxtaposition and similarity of the county attorney's objection with and to the question of the judge, we cannot say that the judge's question is liable to the objection that it assumed the fact that defendant stole the mare. Defendant's counsel should have excepted to the question or remark at the time, so as to have given the judge an opportunity of explaining to the jury that no such assumption was meant or intended. This he did not do, as is shown by the bill of exceptions itself, which appears only to have been asked five days after the verdict and judgment. Our statute provides that, "In ruling upon the admissibility of evidence the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it be admissible. Nor shall he at any stage of the proceedings previous to return of verdict make any remark calculated to convey to the jury his opinion of the case." Code Crim. Proc. art. 729.

"So jealous are the courts of the right of trial by jury, in some of the States particularly, in criminal cases that an expression of opinion thrown out by the judge in the hearing of the jury, while deciding a question of law in the case, has been held ground for reversing the judgment. For it is evident that the opinion of the judge can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon what purports to be a question of law, as by importing it in what purports to be a declaration of law framed for their guidance. It has been accordingly held that a judge has no more right to volunteer before the jury his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge in respect to such fact. * * * Juries, particularly ignorant juries, watch with great eagerness any expression of opinion from the bench, and are very apt to follow it whether it is given in the form of an instruction to them or whether it falls from the lips of the judge as a casual remark. Hence in those courts where the province of the jury is jealously guarded, light or careless expressions of opinions upon the part of the judge which have a tendency to intimate to the jury his opinion upon the evidence have sometimes been held grounds for reversing the judgment." Charging the Jury (Thompson), §§ 53, 54.

We are of opinion that prompt objection and exception should be made and taken to all such remarks, so that the court may have an opportunity then and there to explain and do away with any such wrong impression on the part of the jury as may unintentionally have been made. We cannot see that defendant in this instance was injured by the question asked, though unquestionably it would have been as well if the court had omitted to ask it.

There is no error in the record requiring a reversal of the case, and the judgment is affirmed.

Affirmed.

JAMES WRIGHT *v.* THE STATE.

1. Practice — Evidence. — Unless part of the *res gestæ*, or part of a conversation put in evidence by the prosecution, the declarations of one conspirator in favor of his fellow are not admissible as evidence. Note suggestions of this court as to what matter should be embraced in bills of exception reserved to the rulings of the court below on the evidence.
2. Same. — When a party is first found in possession of recently stolen property, and his explanation is reasonable, natural and probable, the burden of showing its falsity is thrown upon the State. His statements in explanation are admissible in his own behalf if made when first arrested; and so, it seems, are such statements of his co-conspirator if made in his presence.
3. Same. — The indictment charged the theft of "one certain horse, the property of A," giving no further description, and the court permitted the witnesses to describe the horses of A found in defendant's possession. *Held*, that the court did not err. If the defendant had more than one of A's horses in his possession, and they were taken at or about the same time, the State could show it for the purpose of establishing identity in developing the *res gestæ*, or in making its proof by a chain of circumstances connected with the offense on trial, or for the purpose of showing motive or intent in the crime charged.
4. Practice. — When, as in this case, it appears that the court was limited to a single week in which to dispatch its business, — that one of its rules was to give preference to jail-cases, — and that the defend-

ant was the only person confined for trial (all others being on bail), this court will not reverse because he was forced to trial before others whose cases had precedence on the docket, unless it appears that he suffered injustice thereby.

5. EVIDENCE.—The question "from what you saw, did the defendant have as much to do with those horses as any body else?" was erroneously permitted, as leading and suggestive, and as calling for the opinion and conclusions of the witness.

APPEAL from the District Court of Kendall. Tried below before the Hon. T. M. PASCHAL.

The indictment charged the defendant and four others with the theft of "a certain horse, the property of G. E. Albee." The trial of this defendant resulted in his conviction, with five years in the penitentiary assessed against him as his punishment. The statement of facts is not certified by the trial judge.

Tarleton & Boone, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. One J. T. Walker and others were jointly indicted with appellant for theft of a horse, the property of Albee, but, upon motion of the defendant, when the case was reached for trial a severance was granted and appellant alone was placed upon trial. On cross-examination of the State's witness Reinhard, he was asked by defendant's counsel as follows: "You have stated that Walker make a statement, about ten minutes after the arrest of the defendants, in the hearing of defendant, explanatory of the possession of the horses alleged to have been stolen; please state what said statement was?" Which being objected to by the prosecution, the court would not allow the witness to testify as to said statement, and defendant reserved a bill of exceptions.

The general rule seems to be that "the declarations of one co-conspirator in favor of a fellow conspirator cannot from the nature of things be put in evidence unless part of the *res gestæ* or part of a conversation put in evidence by the prosecution." Whart. Crim. Ev. (8th ed.) § 703. The bill of exceptions does not disclose whether the statement alluded to was drawn out on direct examination as part of a conversation between Reinhard and the co-defendant Walker, or not. It would always be more satisfactory if a bill of exceptions reserved to rulings upon evidence should be explicit in showing the facts as to how and in what manner the question arose, as well as in setting forth the evidence objected to, or what would have been the testimony excluded — so that this court may see and know everything necessary to a full understanding of the matter complained of.

In this instance, if the statement of Walker was *res gestæ* then it was admissible, and, being in presence of defendant, it was applicable to and could be availed of by one as well as the other party. When a party is first found in possession of property recently stolen, and his explanation of his possession is reasonable, natural and probable, the burden will be imposed upon the State to show that it is false. And when a similar question to the one under consideration arose in *Garcia* v. *State*, 26 Texas, 209, the court said: "The statement made in the presence of the appellant by Deal, who assumed the entire guilt if any offense had been committed, seems to be a reasonable and satisfactory explanation of the appellant's connection with and apparent joint possession of the property, and was sufficient, unless in some manner rebutted by the State, to have exonerated him from the presumption of guilt arising from his presence with it." A different rule, it seems, prevails in Georgia, and there such evidence has been held wholly inadmissible. *Lyon* v. *State*, 22 Ga. 399.

It would appear that Walker's statement was made within ten minutes after the arrest. This perhaps would not be too long a lapse or interval of time to place it beyond the bounds of *res gestæ.* A defendant's statements explanatory of his possession, when first arrested, are admissible evidence in his behalf. *Shackleford* v. *State,* 43 Texas, 138; *Hannah* v. *State,* 1 Texas Ct. App. 578; *Shackleford* v. *State,* 2 Texas Ct. App. 385; *Hampton* v. *State,* 5 Texas Ct. App. 463. As *res gestæ,* we are of opinion defendant was entitled to the testimony.

There was no error committed in permitting the witness to describe the horses found in possession of defendant and belonging to Albee. Defendant was charged by the indictment with the theft "of one certain horse," the property of Albee, and no description was given of said horse. If he had in his possession more than one horse of Albee, and they were taken at or about the same time, the State was entitled to show the fact, if necessary to establish identity in developing the *res gestæ,* or in making out the guilt of defendant by a chain of circumstances connected with the crime for which he was on trial, or for the purpose of showing the motive or intent with which the particular act charged was done. *Gilbraith* v. *State,* 41 Texas, 567; *Webb* v. *State,* 8 Texas Ct. App. 115; *Hardin* v. *State,* 8 Texas Ct. App. 653; *Speights* v. *State,* 1 Texas Ct. App. 551.

Nor was there error in the court's calling and disposing of this case out of its regular order, or without disposing of cases preceding it on the docket. Ordinarily such procedure would be error, perhaps. *Thomas* v. *State,* 36 Texas, 315. In this instance, however, the defendant was in jail and the only prisoner in the jail—parties in all of the other cases being on bail—and the term of the court was limited to a single week, and it was a rule of the court to give preference in trial to jail cases; and very properly we think. Under such circumstances, without great injustice is shown by such procedure, this court will not reverse a judgment upon such ground. *Nichols*

v. *State*, 3 Texas Ct. App. 546; *Hampton* v. *State*, 5 Texas Ct. App. 463; *Jones* v. *State*, 8 Texas Ct. App. 648.

We are of opinion, however, that the court erred in overruling defendant's objection to the following question propounded by the prosecution to one of the State's witnesses, viz.: "From what you saw, did the defendant Wright seem to have as much to do with those horses as any body else?" The question was leading, and suggestive to the witness of the answer desired. Furthermore, it sought and elicited from the witness his opinion and conclusion from what he saw, without confining him to a statement of the facts, and leaving the inference and conclusions to be deduced from the facts by the jury.

Many other errors are complained of, which, in the absence of a statement of facts, cannot be considered or determined, and most of them are not likely to arise on another trial. Without a statement of facts it is impossible for us to determine whether the court should have charged on circumstantial evidence and upon the law with regard to the removal of stock from its accustomed range. The bills of exception do not make manifest the necessity of such charges, in the absence of a statement of facts.

For the errors above indicated, the judgment will be reversed and the cause remanded.

Reversed and remanded.

J. C. HAYNES *v.* THE STATE.

1. CHARGE OF THE COURT.— **The accused was indicted under art. 679 of the Penal Code for the wilful killing of a cow. In the charge the court embraced all of the animals and birds named in the Code. While this court does not hold such error sufficient for reversal, the propriety of confining the charge to the animal named in the indictment is suggested.**

2. Same. — After charging that, to convict, the jury must believe the defendant guilty beyond a reasonable doubt, the court further charged: * * * "if you believe from the evidence, beyond a reasonable doubt, that the defendant is not guilty as charged in the indictment, you will simply say so in your verdict." ***Held*****, error as requiring the jury to believe the defendant's innocence beyond a reasonable doubt, before they could acquit him. Such a charge is fundamentally erroneous, though neither bill of exception nor statement of facts is brought up in the record.**

Appeal from the County Court of Hood. Tried below before the Hon. T. J. Duke, County Judge.

The opinion discloses the case. The fine imposed by the verdict was ten dollars.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Hurt, J. Appellant was indicted and convicted for a violation of art. 679 of the Penal Code, which reads as follows: "If any person shall wilfully kill, wound, maim, poison or disfigure any horse, ass, mule, cattle, sheep, goat, swine, dog, or other domesticated animal, or any domesticated bird of another, with intent to injure the owner thereof, he shall be fined not less than ten nor more than two hundred dollars. And in prosecutions under this act, the intent to injure may be presumed from the perpetration of the act."

The defendant was charged with wilfully killing a cow. The learned judge embraced in his charge all of the animals named in the act, and also the domesticated birds. While it is true that the jury's attention was specially called to the cow, we most earnestly recommend that the charge be confined to the animal named in the indictment. We are not to be understood as holding that such a charge would necessitate a reversal.

The learned judge charged the jury that to convict they must believe the defendant guilty beyond a reasonable doubt. Then taking the other end of track he charged: "I further charge you, gentleman, that if you belive from the evidence, beyond a reasonable doubt, that the defendant, J. C. Haynes, is not guilty as charged in the indictment, you will simply say so in your verdict and no more."

These charges placed that jury in a very perplexing position. If the evidence was not sufficient to generate in their minds the belief of his guilt beyond a reasonable doubt, they were charged not to convict. On the other hand, if there was a reasonable doubt of his innocence they could not acquit, because they were required to believe him innocent beyond a reasonable doubt. The jury in a criminal case is never called upon to pass upon the innocence of the defendant — it is his guilt and not his innocence which is to be ascertained. We think the error in this charge is fundamental, and, whether objected to or not, is cause for reversal. Nor is it affected by a want of a statement of facts, for under no statement of facts could this charge be proper. Not only so, such a charge would be radically wrong, under any statement of facts.

For the error in the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

T. B. Archer v. The State.

1. Sunday Law.—Indictment, in order to charge an offense under art. 186 of the Penal Code, should allege that the accused was either a merchant, a grocer, or a dealer in wares and merchandise, or a trader in a lawful business, as the case may be.

2. Same.—If there be an exception in the enacting clause of a statute, such exception must be negatived, and though this be necessary, yet, if the subject-matter of the negative averment lies peculiarly

within the knowledge of the accused, the averment is taken as true unless disproved by the accused.

3. **Same.—Prosecutions for selling liquor on Sunday do not, however, come within the exception. The allegation that the accused was "a dealer" does not occupy the position of a proviso or exception, but is an essential affirmative allegation, and must be proved.**
4. **Same—Evidence.—Proof that the accused was merely a clerk in the saloon will not sustain the allegation that he was a dealer.**

Appeal from the County Court of Johnson. Tried below before the Hon W. J. Ewing, County Judge.

The opinion sufficiently discloses the case.

Oatis & Kouns, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Hurt, J. Appellant was convicted under article 186 of the Penal Code, for selling whiskey on Sunday. The indictment, as was required by the provisions of that article, charged that "one Anderson and the defendant, being then and there dealers in spirituous liquors, said business of dealing in spirituous liquors being then and there lawful, did then and there unlawfully sell one quart of spirituous liquors, etc., on the sixth day of June, eighteen hundred and eighty, the said sixth day of June being then and there Sunday."

If this indictment had omitted to charge that the defendant was a merchant, grocer, or dealer in wares and merchandise, or trader in any lawful business, it would have been fatally defective. One of these allegations was absolutely required in order to the sufficiency of the indictment. Being, then, necessary to the sufficiency of the indictment to charge one of these facts, was it necessary to prove the allegation? We think so. These elements, or one of them, are ingredients of the offense; and it is a well-settled principle that these must be proved, unless the case comes under the exception which is as follows: If there is an exception in the enacting clause, the indictment must negative the exception, and thereby show that the defendant is not within the exception; and though it is necessary to negative this exception, yet if the subject-matter of the negative averment lies peculiarly within the knowledge of the defendant, the averment is taken as true, unless disproved by the defendant. This proposition has been held correct by any number of the decisions of our Supreme and Appellate Courts. But notwithstanding this it is in direct conflict with article 1241 of the Code of Criminal Procedure. That article provides: "Everything should be stated in an indictment which it is necessary to prove, but that which it is not necessary to prove need *not* be *stated.*" It is well known to the profession that in prosecutions under the old act against carrying arms, under the act for violating the estray laws, and the act for selling whiskey without license, each and every proviso or exception contained in the enacting clause was required to be negatived by proper allegations in the indictment. Notwithstanding this, we have an unbroken line of decisions holding in these very cases that, though these negative allegations are necessary, the State is not required to prove them. Because, if the defendant comes within the provisos or exceptions, having the means in his power he can show it without the least inconvenience; whereas if th s character of proof were required of the State, great inconvenience would follow. Greenleaf's Ev. vol. 1, sec. 79.

But, to return: This case does not come within the exception. The allegation that defendant was a "dealer" does not occupy the position of a proviso or exception; therefore it is not within the rule. It is not only an essential but an affirmative charge, and must be proved as alleged.

The evidence shows that the defendant was merely a clerk in the saloon. This is not sufficient. It is insisted that the single act of selling constitutes a "dealer." If so, there was no necessity or sense in inserting in the act this or the other elements. It should have provided that if any person should sell or barter on Sunday he should be punished. This the legislature had not done, and as the legislature,—the law-making power,—has seen proper to insert in the act certain elements of the offense, we are not at liberty to eliminate them from the act, and make acts penal which are not denounced as such by the law.

The verdict not being supported by the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

HENRY M. PHARR v. THE STATE.

1. EVIDENCE—DECLARATIONS OF AN ACCUSED.—Declarations made by a party accused of crime are not admissible as evidence in his behalf, unless they form a part of the *res gestæ*, or are a part of a confession offered by the prosecution, or come within the rule that when a part of an act or declaration has been given in evidence the whole may be required.
2. EVIDENCE—RES GESTÆ.—Declarations of a party charged with murder, which were made the day after the killing, and many miles from the scene, form no part of the *res gestæ*.
3. CHARGE OF THE COURT—PRACTICE.—Article 783 of the Code of Criminal Procedure inhibits, in an argument upon a second trial, any allusion to a former conviction, but does not prohibit a reference in the charge of the court to a former acquittal of higher grades of the offense charged in the indictment. It was not error, therefore, for the District Judge, in his charge to the jury on the second trial of a defendant charged with murder, to state that the defendant had been acquitted of murder in the first degree, and that, therefore, there was no occasion for him to explain to the jury the difference between the two degrees of malice. In such cases it is proper for the judge to instruct the jury, in appropriate

language, that they should not consider the subject of murder in the first degree.

4. SAME — CERTAINTY. — Moral certainty is that degree of certainty which is supported by a reasonable probability, founded on the experience of the ordinary course of things, and consequently must be reasonable in itself. It was, therefore, not error in a charge on circumstantial evidence to instruct the jury that all the circumstances, when taken together, must lead to a satisfactory conclusion and produce in effect a *reasonable and* moral certainty that the defendant and no other person committed the offense charged.
5. SAME. — The italicising or underscoring of the word "unlawfully" in a charge of the court on a case of murder affords the accused no ground of complaint. The killing to be criminal must be unlawful, and this cannot be too pointedly called to the attention of the jury.

APPEAL from the District Court of Johnson county. Tried below before the Hon. Jo. ABBOTT.

The appellant was charged by indictment with the murder of an unknown party on 14th day of July, 1877. This is the third appeal in the case, the first report of it being in 7 Texas Ct. Appeals, p. 472, and the second in 9 Texas Court of Appeals, p. 129. On the last trial he was again convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary; from which judgement this appeal is prosecuted.

A statement of the facts will be found in the report of the case at page 472, 7 Texas Ct. App.

Brown, Hall & Ramsey, and *Jack Davis*, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. There is a marked difference in the attitude of the prosecution in this case and that occupied on the second appeal (9 Texas Ct. App. 129), in respect to the statements made by appellant to the witness Coulter on the day after the latter had arrested him for the murder. On the former appeal the State had elicited from the witness on his direct examination a part of the conversation which ensued between defendant and witness, with regard to the killing, after the witness had informed the prisoner of the cause of his arrest. Part of this conversation, or part of the declarations made use of by defendant at the time, having been drawn out by the State, it was held error for the court to refuse to permit defendant to put in evidence the whole of the conversation upon the same subject, or any other act or declaration necessary to make it fully understood, or to explain the same. Code Crim. Proc. art. 751.

In the present case the State appears carefully and successfully to have avoided drawing out from the witness any part or portion of such conversation. On cross-examination, defendant's counsel proposed to institute inquiry into this conversation and to introduce in evidence the statements and declarations then made therein by the defendant as to the causes and circumstances of the killing. On objection by the prosecution the court refused to admit the declarations and statements. In this the court did not err. Nothing had been elicited by the State requiring explanation, and no part of the conversation had been drawn out.

Declarations made by a defendant in his own favor are not admissible in his behalf unless part of the *res gestæ*, or part of a confession offered by the prosecution; or unless coming within the rule that when part of an act, declaration, etc., is given in evidence the whole may be required. Whart. Crim. Ev. (8th ed.) sec. 690; Code Crim. Proc. art. 751. The proposed declarations having been made the day after the murder and many miles distant from the scene, they were clearly not part of the *res gestæ*. Whart. Crim. Ev. § 691; *Foster* v. *State*, 8 Texas Ct. App. 248; *Boothe* v. *State*, 4 Texas Ct. App. 202.

Several grounds of complaint are urged to the charge of the court. It is contended that it was error to instruct the jury, in the 7th paragraph, as follows, viz.: "In this case the defendant has been acquitted of murder of the first degree, and therefore there is no necessity for explaining to you the difference between the two degrees of malice." It is said in the brief of counsel that "it was error in the court to refer to the former trial of this case, implying, as such reference did, that defendant had been convicted for any purpose" (citing Code Crim. Proc. art. 783, etc.). The article referred to inhibits an allusion to *a former conviction* in the *argument* on a second trial, and not to a reference in the charge of the court to *a former acquittal* of one of the higher degrees charged in the indictment. The correctness of such a reference by the court to a former acquittal of murder in the first degree was controverted in *West* v. *State*, 7 Texas Ct. App. 150, and the manner in which the court made the reference was much more objectionable than as here presented, and it was there held not only that the error was one not calculated to injure the rights of the defendant, but it was said with regard to the duty of the judge in such cases: "He should have informed the jury in some appropriate language that they would not consider the subject of murder in the first degree, or that they would not consider any higher grade of offense than murder in the second degree, without saying in effect that the defendant had already been once convicted of murder in the second degree."

Its sufficiency and correctness as to circumstantial evidence is another supposed error in the charge which is complained of by appellant. The particular portion assigned as error is the following part of paragraph 14, viz.: "all the circumstances, when taken together, must lead to a satisfactory conclusion, and produce in effect a reasonable and moral certainty that the defendant, and no other person, committed the offense charged." Objection is that circumstantial evidence is in law only required to produce in the minds of the jury "a moral and not *a reasonable* certainty." We confess it requires a refinement of discrimination which we cannot appreciate to discover how it would be possible for the defendant to be injured by the court's requiring "a reasonable and moral certainty" as the effect to be produced by the evidence instead of limiting the effect to "moral certainty" alone. Moral certainty is that degree of certainty which is supported by reason or probability, founded on the experience of the ordinary course of things, and consequently must be reasonable in itself.

No form of words have been prescribed for a charge upon circumstantial evidence. In the case before us the charge is amply sufficient to instruct the jury as to its sufficiency and conclusiveness. *Williams* v. *State*, 41 Texas, 209; *Rodriguez* v. *State*, 5 Texas Ct. App. 256; *Hunt* v. *State*, 7 Texas Ct. App. 212; *Rye* v. *State*, 8 Texas Ct. App. 153; *Simms* v. *State*, 8 Texas Ct. App. 230; *Taylor* v. *State*, 9 Texas Ct. App. 104.

Another objection urged to the charge is that the word "unlawful" when used with the word "killing" is italicised or underscored. We see no ground of complaint in this, because every killing to be criminal must be unlawful, and that it must be so cannot, we conceive, be called too prominently to the attention of the jury. We notice that the word is underscored where, if any particular significance should be given to that fact, it would inure to the benefit of the defendant. As a whole, we see no objection to the charge. It was a fair and full exposition of the law applicable to the facts.

There is no error for which the judgment should be reversed, and it is therefore in all things affirmed.

Affirmed.

JOHN HAILES v. THE STATE.

1. EVIDENCE — BILL OF SALE. — The contest in this case being whether or not the animal alleged to have been stolen corresponded with the description given in a bill of sale made by the defendant, and not over the description given in the bill of sale itself, upon which witnesses for both sides agreed, its production as primary evidence was not essential. The bill itself was neither the best nor any evidence upon the issue involved.
2. PRACTICE — CONTINUANCE. — Witnesses for whose evidence a continuance was asked resided in a county other than that in which the prosecution was pending. Process for them was secured by the defendant, and by him delivered to the sheriff of the forum, who promised to transmit the process to the sheriff of the county where the witnesses resided. Non-service was the basis of the application for continuance. *Held*, that diligence was not shown.

APPEAL from the District Court of Lampasas. Tried below before the Hon. W. A. BLACKBURN.

The indictment charged the defendant and Thomas Johnson with the theft of one head of neat cattle. Four years in the penitentiary was the punishment awarded.

The contest was purely over the identity of the animal, and involves no evidence necessary to an understanding of the questions decided in the opinion.

Mathews & Walker, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. If there had been any dispute as to the contents of the bill of sale, then the bill of sale would have been the best evidence of the fact. But there was no such dispute, — no controversy at all as to its contents. The State's witness and the defendant's both testified, and their testimony agreed as to the description given by defendant, in the bill of sale, of the age, color, sex, mark and brand of the animal alleged to have been stolen. It was not the description of the animal as given in the bill of sale which was controverted, but, the description in the bill being agreed upon by both sides, the question was whether or not the animal alleged to have been stolen fitted the description thus given. This was a fact which the bill of sale itself could in no manner have elucidated, and consequently it was neither the best or in fact any evidence calculated to determine that or any other issue in the case, under the circumstances.

So far as the contents of the bill of sale were concerned, they were not denied, and the defendant had the full benefit of them,—just as much so as if the bill of sale had been in evidence, and it is not perceived how he could have been injured by its non-production. The controversy was not between him and his vendee in the bill of sale, in which event there might have been some plausibility if not conclusive force in the objection that any matter relating to its contents could only be proven by itself; but the dispute as to ownership was between the defendant and a third party who was in no manner a party or privy to the bill of sale. In such case it could possibly cut no figure and settle no circumstance of the disputed fact. Defendant had sold the identical animal, no matter what description he had seen fit to give of it; was it his or the property of the owner alleged in the indictment? The witnesses for the State not only identified the animal by the flesh marks, but by the marks and brands of the alleged owner, which they say, though an attempt had been made to change them, were still plainly to be seen and recognized. Defendant controverted this position, and contended that the marks and brands were other and different ones. To hold the bill of sale sufficient to settle the matter would simply be to allow defendant's own declarations to serve in determining his rights, and that too when, if the evidence of Tilford Bean is to be believed, at the time it was made defendant purposely and intentionally falsified the facts and manufactured the bill evidently with that intention. The court did not err in overruling defendant's objection to the testimony on the ground that the bill of sale was better evidence than oral testimony of the description of the animal.

With respect to defendant's applications for continuance, the applications show that neither of the witnesses mentioned were residents of Lampasas county, where the prosecution was pending. Instead of sending the attachments to the counties of the residence of the respective witnesses, defendant placed them in the hands of the sheriff of Lampasas, upon the promise of the latter that he would endeavor to have the process executed. To have brought himself within the diligence required by law, he should have sent the process to the proper officer of the proper county,—the county of residence of the witness. It was not sufficient to place them in the hands of an official who was not bound to execute them. And if defendant was willing to take the chances of such want of diligence, then he has no one to blame but himself. Considered in the light of the other facts, with reference to the motion for a new trial, the materiality of the testimony does not appear with the requisite certainty. All that the witnesses were supposed to be able to prove might be proven, and yet it would not controvert defendant's guilt with regard to the particular animal stolen, unless they had seen the animal after it was sold to Bean, and could then have testified that it was the animal sold by Boulden to defendant.

We see no error in the record, and the judgment is affirmed.

Affirmed.

Sam Willis v. The State.

1. **Misdemeanor — Practice — Charge of the Court.**— If the court in a misdemeanor trial gives an erroneous charge in writing, exception must be reserved, otherwise the error, unless fundamental, is not cause for reversal.
2. **Venue.**— Proof that the offense was committed within one hundred and twenty-five yards of a point located by the evidence within the body of the county is sufficient proof of the venue of the offense.
3. **Same — Indictment.**— An offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either, and the indictment may allege the offense to have been committed in the county where it is prosecuted.

Appeal from the County Court of Williamson. Tried below before the Hon. G. W. Glasscock, County Judge.

The information charged the appellant and two others with an aggravated assault upon John Hodge, committed on the 13th day of January, 1881, in Williamson county. The appellant was convicted notwithstanding a conflict of testimony, and his punishment was assessed at a fine of fifty dollars.

W. C. Belcher and *J. N. McFaddin*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

White, P. J. There was no exception to the charge of the court, nor were there any special instructions requested for defendant. The rule is that if the court in a trial for misdemeanor gives in writing an erroneous charge, it is not cause for reversal on appeal, unless exception was duly reserved at the time, or the error be fundamental. *Hobbs* v. *State*, 7 Texas Ct. App. 117; Code Crim. Proc. art. 685. Aside from the want of a bill of exceptions, that portion of the charge complained of, with regard to mutual combat and the use by one party of a deadly weapon, or the taking of undue advantage of his adversary, was not obnoxious to the criticism and objections urged to it. 3 Greenl. Evid. § 121; *King* v. *State,* 4 Texas Ct. App. 54; *Wilson* v. *State,* 4 Texas Ct. App. 637; *Bingham* v. *State,* 6 Texas Ct. App. 169.

The only other point made worthy of notice is that the venue was not proven. Upon this point the statement of facts recites that "the State proved by the witness John Hodges that, on the 13th day of January, A. D. 1881, in the county of Williamson and State of Texas, he was at a festival at the church near Circleville; witness came out of the house and saw defendant at a fire about 10 steps from the house, and went up to him." An altercation ensued about some statements accused had made concerning witness. The result was they agreed to go off and fight. He says, "we went off together about one hundred or one hundred and twenty-five yards, when defendant said we had gone far enough; we then stopped. Witness put his hands behind him and commenced pulling off his coat to fight. The defendant put his left arm, half bent, against defendant's breast; said 'd—n you, don't you like it.' I pulled off my coat and drew back to strike; the defendant was also in the act of striking, when I stepped on a rock and stumbled and fell forward and he and defendant butted against each other. When witness regained his standing position he was seriously cut in the right arm between the elbow and shoulder, on the back of the arm, with some supposed sharp instrument; didn't see it but felt it; did not know whether it was a knife or razor, or something else."

From the above it will be seen that the church was in Williamson county, and the fight was from 100 to 125 yards from the church. Suppose that in going that distance they had actually gone across the Williamson county line into another adjoining county. Would not the offense have still been within the jurisdiction of Williamson county for prosecution? Clearly so under our statute, which declares that "an offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either county, and the indictment may allege the offense to have been committed in the county where it is prosecuted." Code Crim. Proc. art. 209; *Achterberg* v. *State*, 8 Texas Ct. App. 463.

There is no error in the proceedings or judgment, and the judgment is therefore affirmed.

Affirmed.

GEORGE LAWRENCE *v.* THE STATE.

HOMICIDE — CHARGE OF THE COURT in a trial for felony is defective if it omits to apply the law governing every phase of case indicated by the evidence. The omission to apply the law to a single exculpatory theory raised by the evidence is cause for a reversal of the conviction.

APPEAL from the District Court of Waller. Tried below before the Hon. W. H. BURKHART.

The indictment charged the appellant with the murder, in Waller county, on the 1st day of January, 1881, of Thomas Ray, Sr. He was tried, found guilty of murder of the second degree, and his punishment assessed at five years in the penitentiary.

It appears, according to the testimony of the witness Snooks, that, on the night of January 1, 1881, David Ray, son of the deceased, and Alf. Lawrence, brother of the defendant, were engaged in a rough and tumble fight in Fields' store, in Waller county. The deceased came into the store and started towards the combatants, when the defendant, who was standing near the west counter, started at the deceased and pushed him towards the east counter. The deceased recovered himself and pushed defendant across the room and against the west counter, when the latter raised a pistol and fired, the bullet striking deceased in the head and killing him instantly. Defendant fled, and witness did not know where he went to. The deceased was a stout, robust man of some fifty years of age. The cross-examination developed nothing of importance.

The testimony of the remaining witnesses for the State was substantially the same as that of the witness Snooks. None of them, however, saw the deceased when he entered the store, and they noticed him for the first time when he and the defendant were clinched, the former pushing the deceased towards the east counter. Otherwise their narratives corroborate Snooks in every particular.

J. M. Pinkney, for the defense, testified that, about an hour after dark, himself and the deceased went to Fields' store, and as they stepped in the door they saw David Ray and Alf. Lawrence scuffling on the floor. The deceased motioned the witness to one side and made a rush at defendant, and crowded him over against the west counter, and while he was in that position the witness saw a pistol raised and fired near the head of the deceased, who stepped back and fell, and the witness saw no more of the defendant after the pistol fired. The witness saw no demonstrations made by the defendant. He was taking no part in the fight between his brother and David Ray. The deceased and his four sons were attending court that day, and G. W. Snooks and A. Hawkins were with them. They had arms. The deceased was prosecuting one Wm. Matchett, with whom he had had a difficulty. The witness went on to explain his means of knowing that the Rays were armed. He stated that the deceased was a much heavier and stouter man than defendant.

Cross-examined by the State, he testified that the deceased had no arms or knife in his hands when he and defendant clinched — thinks that if he had, he, the witness, would have seen them. When the pistol fired, the deceased had his hand on the upper part of the defendant's breast, near the shoulder, and had pushed him backwards, inclining over the counter. The pistol-hand appeared to the witness restrained, as though some one were holding it. The pistol was within an inch and a half of the deceased's head, when fired. The defendant had borne the reputation of a quiet, peaceable citizen.

J. L. Boulware, deputy sheriff, for the defense, testified that the first he saw of the difficulty between deceased and defendant they were clinched. The defendant pushed the deceased towards the east counter, or the deceased pulled the defendant in that direction, and then pushed him over against the west counter, when the witness saw a pistol raised and fired near the deceased's head. The deceased fell, and defendant fled, since which time witness saw him no more until the 5th day of January, when he voluntarily surrendered. There were no wounds on the head or neck of the defendant up to the time that he and deceased clinched, and if he had been cut in the house after the firing of the fatal shot, the witness would have known it. This witness' description of other occurrences in the store-house agreed with those of the previous witnesses, except that he stated that about a half minute or longer before the deceased came into the store, the defendant struck David Ray, who was engaged in a fight with his brother, twice over the head with a pistol. He testified also to the defendant's reputation as a quiet and peaceable citizen.

E. Lacy, the defendant's brother-in-law, testified for the defense that he lived about four miles from Fields' store. At about 8 o'clock on the night the deceased was killed, the defendant came to witness' house, suffering from two cuts, one on the back and one on the neck, the latter barely penetrating the skin. He had a handkerchief, which was saturated with blood, tied around his neck. The witness washed and dressed his wounds, one of which was still bleeding, and then rode rapidly to the store, to see about the killing and about Alf. Lawrence. He returned within an hour and a half and he and the defendant went to the woods and remained all night. The witness discovered next day that the defendant had been cut near the top and on the right side of the head. The witness identified an overcoat exhibited as the one worn by the defendant on the night of the killing. It had a cut through the back of the collar, and one on the right arm.

H. McKaskell corroborated the last witness as to the wounds on the defendant, and the cuts on the coat.

Renfro, for the defense, testified that he was near but not in the house at the time of the killing. The deceased, his four sons, with Snooks and Hawkins, went to the store together. During the day the deceased and Matchett had a difficulty. Snooks and Hawkins showed a disposition to "crowd on" Matchett, to such an extent that the witness concluded that the parties named had an understanding to act together in any difficulty into which either might get.

The State, in rebuttal, introduced Ambrose Hawkins, who testified that when the deceased was shot, he, witness, was standing inside the house, near the north door and the end of the east counter. Alf. Lawrence and Dave Ray were fighting, when the defendant came in and asked, "what are you doing, Dave?" Tom Ray said, "they are fighting." The deceased then started towards them, and the defendant caught hold of him and shoved him back against the east counter, drew his pistol with his right hand, and shot him. When the deceased entered and the defendant advanced, the latter said to deceased, "God d—n you, do you want some of it?"

Crossed by the defense, the witness said that he did not see J. M. Pinkney near the door. He denied that after the shooting he said in the presence of the two Pinkneys and Boulware that he would "have the defendant's heart's blood, if he had to follow him to the jumping off place," but did say "we will have revenge." Denied going armed for the defendant or carrying arms with the Ray boys. He had a gun when he came into Hempstead on the Monday before this trial, and carried it because he had heard there were parties in Waller county who had threatened to kill him and Snooks. He testified that he had no ill feeling towards the defendant.

The defense recalled J. M. and T. D. Pinkney and Boulware, each of whom imputed to the witness Hawkins the language which, on his (Hawkins') cross-examination, he denied. J. M. Pinkney stated that Hawkins was not standing near the north end of the east counter as he had stated; that he, witness, was standing there himself, and Hawkins could not have occupied that position without touching witness and being seen by him. The deceased did not ask Dave Ray what he was doing. Tom Ray did not say "they are fighting;" the defendant did not ask the deceased "if he wanted a hand in it;" nor push the deceased against the east counter and there shoot him, but was by the deceased pushed against the west counter, where the deceased was shot.

Boone & Griffin, and *H. M. Browne*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was convicted of murder of the second degree, and his punishment fixed at confinement in the penitentiary for the term of five years.

The statement of facts presents three theories in regard to the homicide.

1st. That the *defendant* brought on the conflict by assaulting the deceased, and while engaged in the fight drew his pistol, and killed the deceased, and is therefore guilty of murder.

2d. That *deceased* brought on the conflict, was the aggressor, and the life of the defendant being in danger, he killed the deceased, and is therefore guilty of no crime.

3d. That the *defendant* was the aggressor, but that the aggression was not made with intent to bring on a conflict, and for the purpose of killing, and that a serious personal conflict ensued in which great injury was inflicted by the deceased by means of weapons or other instruments of violence, or by means of great superiority of personal strength, and therefore the killing was not murder but manslaughter.

The charge of the court applied to the facts the law of murder of the first and second degrees, also that of manslaughter, except the 2d subdivision of art. 597. Adequate cause being the subject of said article, the said subdivision provides that: "A serious personal conflict in which great injury is inflicted by the person killed, by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict and for the purpose of killing."

As above stated, the evidence clearly indicates these three different theories. The court should have applied the law to each. This was not done. There was no attempt to apply it to the third proposition.

The other grounds assigned (and there are a great many) will not be noticed, as there is not the least danger of their repetition.

For the error of the court in not giving in charge all of the law applicable to the facts of the case, the judgment is reversed and the cause remanded.

Reversed and remanded.

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R. E. HEWITT v. THE STATE.

PRACTICE — EVIDENCE. — Art. 661 of the Code of Criminal Procedure provides that evidence essential to the due administration of justice shall be received at any time before the conclusion of argument. If the admission of the evidence was necessary to the due administration of justice, the court had no discretionary authority to exclude it. Note the facts of this case.

APPEAL from the District Court of Bowie. Tried below before the Hon. B. T. ESTES.

The indictment charged the theft from W. W. Sanders, in Bowie county, on the 15th day of May, 1880, of ten twenty-dollar gold pieces. The appellant was found guilty, and his punishment affixed at two years in the penitentiary.

The substance of the testimony of W. W. Sanders, for the State, was that, on the 1st day of May, 1880, he was engaged in merchandising in the village of De Kalb, Bowie county, Texas. He kept his safe in the rear room of his store, and this safe was usually left open during the day. On the 28th day of April, 1880, the witness had put ten twenty-dollar gold pieces, wrapped in a piece of newspaper, in the inside drawer of the safe. At about 3 o'clock, P. M., of the evening of May 1, 1880, he missed the said money from his safe, and it was taken without his knowledge or consent. The witness saw the appellant in De Kalb on that day,—May 1st, 1880. A few days after he missed his money, he heard a conversation between the appellant and some other party, during the course of which the appellant said that he and a friend had drawn $150 in a lottery, and that he expected to realize his interest from his friend, whom he expected to meet at a picnic at Blossom Prairie. About forty days elapsed after the money was taken before the appellant was arrested.

R. S. M. Watson testified, for the prosecution, that on the first Saturday in May, 1880, he was in the freight-room which stands in the rear of Sanders' store building, separated from it by an alley some three feet wide. A door in this freight-room faced a door which opened into the rear room of Sanders' store building, in which the safe was kept from which the money alleged to have been stolen was taken. The witness stood about twenty feet from the freight-room door, and about thirty feet from the safe. While there he saw the appellant standing at the safe; saw him put his hand in the safe and withdraw it with a roll in a newspaper, about two inches long. The appellant passed out of the room and out of the witness' sight, but the witness saw him again presently, opening the package, which, the witness saw, contained some yellow metallic substance, which he took to be gold. He thought at the time that the appellant was stealing, but, though he knew the safe belonged to Sanders and saw him immediately afterwards, he said nothing to him about it.

This witness testified further that himself and the appellant had not been on good terms since the 3d of April preceding, on which day the appellant and a son-in-law of the witness had a fight. The witness and the appellant were distantly related by marriage. The witness told his wife and son-in-law of the occurrence a few days afterwards. This was the same son-in-law with whom the appellant had fought, and the two were at enmity. He refrained from speaking of the matter to others because he had no desire to injure the appellant, and finally told it only when suspicion fell upon his own family. Afterwards witness told T. W. Hooks, one of Sanders' clerks, since dead, and also Capt. McKinney, a commercial traveler. He did not mention on the preliminary trial that he had told Hooks and McKinney, though the former was then alive and both were present; he was not asked on that occasion who were present. The witness admitted that at the preliminary trial he stated that he did not mention having seen the appellant at the safe until suspicion fell on his own family. No one was present with the witness in the freight-room when he saw the appellant at the safe.

James Smith, for the State, testified that about the 1st of May, 1880, the appellant borrowed ten dollars of him to pay a fine imposed for fighting with McCall, son-in-law of the witness Watson, and returned it in eight or ten days.

J. B. Lissiter, witness for the State, testified that he sold the appellant a suit of clothes on or about May 11, 1880, and received a twenty-dollar gold piece in payment. This was before the picnic at Blossom Prairie. Subsequently he saw the appellant in possession of another twenty-dollar gold piece. The witness' store was situated about seventy-five feet distant from Sanders' store, in De Kalb. He knew nothing of appellant's financial condition previous to the alleged theft.

T. H. Lenox, for the State, testified that subsequent to the 1st day of May, 1880, he sold the appellant a horse and received in payment a twenty-dollar gold piece, ten dollars in currency, and the appellant's note for twenty-five dollars.

C. W. Morrow, depot agent of the T. & P. Railway at De Kalb, testified that some days before the Blossom Prairie picnic, which was on May 13, 1880, appellant bought some tickets for which he paid witness a twenty-dollar gold piece, receiving change from witness. The witness changed another twenty-dollar gold piece for him about the same time.

Other witnesses testified to seeing the appellant in possession of gold money of the denomination of $20, subsequent to May 1, 1880, and before his arrest.

John Lawler, for the defense, testified that the picnic at Blossom Prairie was on the 13th day of May, and that three weeks previous thereto, lacking from Thursday to Sunday, he saw the appellant in possession of a twenty-dollar gold piece.

T. E. Hewitt, the appellant's father, testified that during the month of March, 1880, his wife, the appellant's mother, had $150 in gold in the house. He saw it.

Wm. Blake testified that he had for several years known the reputation of the appellant for honesty, and that it was good.

The State proved by the witness Dillard that the appellant's father was poor, and bought goods from him on credit. The appellant lived with his father. Another witness testified that the appellant had offered to purchase goods from him on credit.

J. E. Jacobs testified, for the State, that he was an express agent at Texarkana, and that the defendant had never received an express package from him or over his line. He admitted, however, that there were two express lines to Texarkana.

The opinion indicates the other evidence involved in the rulings of the court below.

Pope & Pope, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Hurt, J. Appellant was tried and convicted of the theft of ten pieces of gold coin of the denomination of twenty dollars each. The prosecution, to convict, relied not alone but largely upon the fact that, just before the theft, defendant was poor, and that he had no money or means; and that just after the theft he was frequently seen in possession of several gold pieces of the same denomination.

It appears by bill of exceptions that on the night of the

7th of March, the trial proceeding, the defendant's counsel, after having examined all of the witnesses in behalf of defendant except Mrs. Hewitt, mother of defendant, stated in open court that Mrs. Hewitt was too unwell to come into the court-room on that night, and gave notice to the court and district attorney that, on convening of court on the next morning, he would offer said witness to prove the reception of an express package that had been shipped from Columbus, Ga., to said witness, and delayed at Texarkana, in the express office, because there was no express office at De Kalb in Bowie county, Texas, the residence of witness; and that said package was, by the agent of the express company at Texarkana, forwarded to Mrs. Hewitt at De Kalb, some time in February or March, 1880, and that said package contained, among other articles of value, one hundred and fifty dollars in twenty-dollar gold pieces, and a ten-dollar gold piece; and that of this money witness had given defendant three of the twenty-dollar gold pieces; one to pay Capt. Tom Lenox on the purchase of a horse, another to Mr. Rosser on purchase of some cows, and another to buy defendant a suit of clothes; and that these gifts were made in the month of May, 1880. And counsel further called the attention of the court to this testimony of this witness as given before the examining court on the 26th day of June, 1880, when an investigation of this charge was had before the examining court. It is admitted in the bill that the witness, Mrs. Hewitt, had sworn before the examining court substantially to the facts as above set forth. In reply to this statement of the defendant's counsel, the district attorney said he would object to the introduction of Mrs. Hewitt as a witness on the following morning, and demanded that the defendant close before he (the district attorney) offered his rebutting testimony. The defendant's counsel then stated that the case was closed, but he would nevertheless offer Mrs. Hewitt as a witness the following morning for the purpose of proving by her what he had just stated.

On the following morning when the court convened, Mrs. Hewitt being in court, she was offered as a witness to prove the facts which have been detailed above, and the attention of the court and district attorney was called to the fact that she had sworn to these facts before the examining court, her evidence being then in court and subject to their inspection. The district attorney objected, which objection was sustained by the court, and defendant by his attorneys excepted and reserved their bill.

Those facts were of the highest importance to the defendant under the case as made by the State. For, if true, the inculpatory evidence of the State, except that of the witness Watson, was explained on this proffered evidence, which tended strongly to explain it. Art. 661 of the Code of Criminal Procedure provides that "the court *shall* allow testimony at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice." If the due administration of justice demanded the introduction of this evidence, the court had no discretion but to admit it. That it was material and of great importance to the rights of the defendant cannot be denied. Did the proper and due administration of the law justify the court in its rejection? We think not, but on the other hand, the attending facts clearly demanded that active operation and application be given to said article. Defendant, the night before the evidence was offered, closed his evidence. At that time Mrs. Hewitt was sick and unable to attend and testify. The court and district attorney were informed of this, and notified that on the next morning she would be offered to prove certain very material facts. That she was sick was not in any manner questioned or denied. There was not the slightest circumstance indicating a disposition on the part of counsel for the defendant to impede the progress of the trial or trifle with the court. How the introduction of that evidence at that time could even tend to obstruct or trifle with the due administration of justice, we fail to comprehend. We are of the opinion that, not only the due administration of justice, but the plainest principles of right demanded its reception. The law does not demand the life, liberty or property of its citizens, but upon a fair and legal trial. Instead of seeking to convict by unfair means, every opportunity should be, and is by the law, extended the citizen to meet the charge made against him, consistent with the due administration of justice.

We are of opinion that the court erred in sustaining the objection of the district attorney to the evidence proffered, and that the judgment should be reversed.

Reversed and remanded.

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Robert Barr, Jr., v. The State.

1. Charge of the Court on Circumstantial Evidence.—See the opinion in this case *in extenso* for a review of the adjudications in this State upon the question whether and how far it is incumbent on the trial courts, in cases dependent on circumstantial evidence alone, to give in charge to the jury, as part of the law of the case, the legal principles formulated and known as the "rule in Webster's case."
2. Same.—Note instructions which are held to be defective and insufficient in the present case.
3. "Reasonable Doubt."—The doctrine of reasonable doubt applies to the general issue of guilty or not guilty, and it was not error to refuse a special instruction which attempted to apply it to each and every fact in proof.

Appeal from the District Court of Travis. Tried below before the Hon. A. S. Walker.

The indictment charged the theft, on the night of January 21st, 1881, of a watch and chain from the possession of W. M. Burton. The verdict returned by the jury was one of guilty, assessing the punishment at confinement in the penitentiary for two years.

W. M. Burton testified in substance that he boarded at the house of Mrs. James, near the capitol, in the city of Austin, and on the night of January 21st, 1881, met the defendant at supper at Mrs. James'. A short while after supper, the defendant invited him to stroll down town, and the two left together, visiting first a saloon near the court-house, where they each took a drink. Afterwards they visited two other saloons, taking one or two drinks at each place. At about 12 or 1 o'clock the witness, being pressed by the defendant to spend the night with him, accompanied him to his room. The witness, on taking off his clothes to retire, carefully folded them, as was his custom, inside out, and placed them on a chair near the bed on the side he occupied. His vest, which contained the watch, he folded so as to conceal the watch and chain, and hung it over his coat on the back of the chair. The two had been in bed but a short time when the defendant got out of bed on his side, and went around to the chair containing the witness' clothes and commenced fumbling with them. He then struck a match and continued fumbling with the clothes, and finally passed out of the room, saying he would return presently. He passed out in his night-clothes, and presently returned and went to bed, and the witness went to sleep. The witness thought strange of the defendant's conduct, but did not think he was stealing.

Witness did not wake up until 7 o'clock next morning, when the steam whistles in the neighborhood commenced blowing. He then missed his watch, and his pocket book containing some money and two free railroad passes. The witness told the appellant, after he examined his clothes, that he had been robbed, and the appellant said "if your watch is gone I'll pay for it." He and the appellant then examined the room carefully. The witness suspicioned the appellant at the time, but thought that he was trying to play a joke on him. Afterwards, during the morning, the witness met the appellant in the capitol grounds and told him that if he was joking with him in taking his property, the joke had gone far enough. The appellant replied very angrily, and threatened the witness for intimating that he stole the watch. Witness then replied "you d—d scoundrel, you stole my property." The appellant's mother at this juncture approached and took him away. The witness notified the pawnbrokers of his loss, and went to a justice of the peace to make complaint, and was there when the watch and chain were returned to him by Jack Goodman, who said that Robert Barr, Sr., had sent them. The witness then dropped the proceedings, and was called before the grand jury about the matter. One of the railroad passes taken at the same time was returned to the witness through the mail.

Jake Schneider, for the defense, testified that on or about the 22d day of January, 1881, a colored man handed him a free railroad pass for W. M. Burton, saying that he found it in front of witness' house, which is on the same street and side as appellant's house. He mailed the pass to Burton.

Cal. Metz testified that he kept a saloon on the opposite side of the street from the appellant's. The latter and the witness Burton were in his saloon on the night of the alleged robbery, about 12 o'clock, both drunk,—full. (The witness Burton had denied that he had been drunk since the night of December 25, 1880.)

Robt. Barr, Sr., testified for the defense that Burton and the appellant came to his house about 3 o'clock A. M. on the night of the alleged robbery, and judging from their talk they were both drunk. Next morning defendant's mother handed witness a watch and chain to be sent to Burton, and he gave it to Jack Goodman for that purpose. The witness did not know whether or not the appellant was his son. He was not married to his mother.

Caroline Robinson, mother of the defendant, testified in substance that when she went into the room in which appellant and Burton slept, to make up the bed, she found the watch and chain in the bolster.

Jones & Trigg, for appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant being on trial, charged with the crime of theft, and his guilt depending on circumstantial evidence, the court in its general charge instructed the jury as follows:

"4th. The law prescribes no rule for the kind or amount of testimony other than that it must be sufficient to fully satisfy the jury of the existence of every fact necessary to constitute the guilt of the accused beyond a reasonable doubt. 5th. Unless the jury are satisfied of the existence of all the facts necessary to the guilt of the defendant, they will find him not guilty."

The question presented for our consideration and determination is, does the instruction given to the jury, in the two paragraphs of the charge set out above, constitute an appropriate charge on circumstantial evidence? In other words, does this instruction properly inform the jury as to the certainty to which this character of testimony must tend in order to form the basis of a conviction for crime?

It is no longer an open question in this court that an instruction on circumstantial testimony is not required to be couched in any definite form of language. It was said in *Rye* v. *State*, 8 Texas Ct. App., at page 160, "The law does not require that a charge on this or any other subject should be couched in any particular set of words or phrases; so that the ideas are sufficient, and so expressed that the jury can readily comprehend the meaning of the language employed, the demand of the law will be satisfied." This language was used with reference to a charge on circumstantial evidence which had been embraced in the general charge, and which was deemed by this court a sufficient charge on circumstantial testimony.

In *Taylor* v. *State*, 9 Texas Ct. App., at page 104, it was said: "In such a case (one dependent on circumstantial evidence), each fact in a chain of facts from which the main fact in issue is to be inferred must, it is true, be established by competent evidence; which is merely another way of stating the proposition that each fact in such chain must be established in proof by evidence, for any other evidence save competent evidence is, in legal contemplation, no evidence. But these isolated facts need not be proved by the same weight and force of evidence as if each one were the main fact in issue; neither need all the facts in evidence before the jury be consistent with each other and the main fact to be proved. The only rule which can be regarded as of practical application in the administration of the law is, that the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury, and to produce in their minds a moral certainty of the guilt of the prisoner, to the exclusion of every reasonable doubt. When the jury is substantially informed of this requisite, as was done in this case, the law is satisfied." The case of *Brown* v. *State*, 23 Texas, 195, is cited in support of this position. *Hardin* v. *State*, 8 Texas Ct. App. 653, which is dependent for its support on *Brown* v. *State*, in order to be properly understood should be considered with reference to the facts in *Brown's* case. *Hardin's* case was not wholly dependent upon circumstantial evidence, and affords no rule applicable to the present inquiry.

Whilst the rulings both in *Taylor's* and in *Brown's* cases are deemed correct, still, when quoted as authority on the general subject of the necessity of a charge on circumstantial testimony, it must be borne in mind that in each of the cases this court was asked to pass upon charges which had been requested by the defendant and refused by the trial courts, and in both cases, as appears from the opinions and reports, the courts below had given to the respective juries a charge which was manifestly deemed appropriate. (See the opinion in *Taylor's* case, and the reporter's statement in *Brown's.)* In our opinion neither of these cases decides the question whether or not a charge on circumstantial evidence should be given, in a proper case, as a part of the law of the case. *Taylor's* case, however, does support the position that such a charge need not be couched in any specified language.

In *Henderson* v. *State*, 14 Texas, at page 514, the court having under consideration the question of the certainty of circumstantial evidence, it was discussed at some length. Wheeler, J., delivering the opinion, uses this language: "The result of the rules of law respecting the sufficiency of circumstantial evidence is very well and concisely stated by the reporter in the case of *The Commonwealth* v. *Webster*, before cited, thus: 'In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged.'" In this case, whilst it is not decided what a charge on circumstantial evidence should contain, it is apparent that in the opinion of the Supreme Court the charge in *Webster's* case was, to say the least, an appropriate instruction on such a subject; as was also held by this court in *Hampton* v. *State*, 1 Texas Ct. App. 652.

In *Rodriguez* v. *State*, 5 Texas Ct. App. 256, this court said: "The doctrine with regard to the conclusiveness and effect of this character of testimony (circumstantial) seems now to be well settled in this state," citing the rule in *Webster's* case, adopted in *Hampton's* case above referred to, and quoting also the rule laid down in *Williams* v. *State*, 41 Texas, 207; thus holding that either rule would fill the demands of the law.

It was not until the decision of the case of *Hunt* v. *State*, 7 Texas Ct. App. 212, that it was ever expressly decided in Texas that, in trials for felony where the proof of guilt depended alone on circumstantial testimony, the court should charge on that character of evidence, as a part of the law of the case, whether requested to do so or not. In this case it was said that "It is no new principle in the law of this State that, to justify a conviction upon circumstantial evidence alone, the facts relied on must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt (citing *Barnes* v. *State*, 41 Texas, 343, and *Black* v. *State*, 1 Texas Ct. App. 391). If this be so, certainly a jury called to pass upon a case of that character should be informed of the rule as a part of the law applicable to the case." In *Hunt's* case it was further said, "An ordinary charge upon the law of reasonable doubt, copied from the statute, cannot convey to their minds a clear conception of this exaction of the law when a conviction is sought upon circumstantial testimony alone; and without some definite rule for their guidance,—a rule which will serve to impress itself upon their minds, and cause them to weigh most carefully all the facts, isolated or connected, from which they must reach their conclusion by reasonable inference,—they are not unlikely in many instances to found their verdict upon strong suspicion or mere probability, which will not suffice under the law."

It was further said, p. 236: "And it is believed that the adjudicated cases in our State furnish no instance of a conviction for a grave felony upon circumstantial testimony alone, unless the charge of the court plainly directed the jury as to the principles of law which should govern them in reaching their conclusion."

In our opinion the rule laid down in *Taylor* v. *State*, 9 Texas Ct. App. 104, and that laid down in *Brown* v. *State*, 23 Texas, 195, when treated in the light of the fact that in each of those cases the jury had been informed with reference to their duty under the facts of those cases, are susceptible of being reconciled with the ruling in *Hunt* v. *State*.

The charges asked by defendant's counsel were objectionable in that it was attempted to apply the reasonable doubt to each isolated fact and feature of the evidence. The law on reasonable doubt is that it applies to the whole case, and not to every particular. *Webb* v. *State*, 9 Texas Ct. App. 490.

On a careful consideration of the adjudicated cases, however, we are constrained to say that in our opinion the charge given in the present case must be held defective and insufficient as a charge on circumstantial evidence, in that it fails to call attention to the subject at all, or to meet the requisites of any of the charges on the subject which have been approved in terms by either the Supreme Court or this court; but especially in that the charge fails to instruct the jury that the facts proved from which the defendant's guilt is to be inferred must not only be consistent with his guilt, but they must also be incapable of any other conclusion than the single one of his guilt, and because of this defect in the charge, the judgment must be reversed and a new trial awarded.

Other interesting questions argued by counsel for appellant need not be considered, as they are all susceptible of being corrected on another trial, if indeed they be errors. Because of a defect in the charge of the court as to the law of the cases, the judgment will be reversed and the cause remanded.

Reversed and remanded.

CHARLES HATCH *v.* THE STATE.

1. **OFFICIAL MISCONDUCT — JURISDICTION.**— The District, and not the County Court, is clothed by the Constitution with the jurisdiction to try offenses involving the misconduct of public officers; and neither the legislature nor the courts can impair that jurisdiction.
2. **SAME.**— Negligently permitting the escape of prisoners in the custody of the accused as an officer is an offense which comes within the definition of official misconduct, and as such is triable in the District Court.
3. **CASE OVERRULED.**— *Watson* v. *State*, 9 Texas Ct. App. 212, overruled on the question of jurisdiction.

APPEAL from the County Court of Falls. Tried below before the Hon. E. C. STUART, County Judge.

The indictment charged that the appellant, while the legal jailor of the Falls county jail and as such the custodian of the prisoners therein confined, did, on the 22d day of December, 1879, negligently permit the escape of one William Hart, confined on a charge of murder, and of three others confined upon charges of offenses less than capital. The verdict found him guilty and assessed his punishment at a fine of $225. No question involving the evidence is discussed in the opinion, and a statement of facts is therefore deemed unnecessary.

Oltorf & Rimes, and *N. P. Jackson*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. On an indictment found in the District Court and transferred to the County Court for trial, the appellant was convicted and a fine imposed of two hundred and twenty-five dollars, and was condemned to pay the costs of the prosecution. It is charged in the indictment that in Falls county, on December 22, 1879, the defendant, with force and arms, then and there being the duly and legally appointed jailor of the county of Falls and State of Texas, and as such jailor the keeper of the common jail of Falls county, Texas, and as such jailor he, the said Hatch, then and there had the legal custody of one William Hart, who was then and there legally accused of a capital offense, to wit: that of murder in the first degree, and then and there having the legal custody of three other persons legally accused and charged with felonies less than capital, did then and there unlawfully and negligently permit him, the said William Hart, and the three other said parties to make their escape from and out of the said jail as aforesaid; contrary," etc. When the indictment was returned by the grand jury through their foreman, an order was made in the District Court that the cause be transferred to the County Court for trial, on the ground, as stated in the order of transfer, "for the reason that this court has no jurisdiction of said cause."

In our opinion the district judge was mistaken in supposing that the District Court did not have jurisdiction of the case, and erred in transferring it to the County Court for trial. By a plain provision of the Constitution of the State it is declared that the District Court shall have original jurisdiction "in cases of misdemeanors involving official misconduct." Besides the provisions of the Penal Code which relate to wilful rescues and escapes (article 313 *et seq.)*, it is provided that, "Any officer, jailor, or guard who has the legal custody of a person accused or convicted of a capital offense, and who negligently permits such person to escape, or to be rescued, shall be punished by fine not exceeding two thousand dollars." Penal Code, art. 204. And if such officer, jailor or guard, who has the legal custody of a person accused or convicted of a felony less than capital, negligently permits such person to escape, or to be rescued, he is liable to a fine not exceeding one thousand dollars; and if the prisoner is accused or convicted of a misdemeanor, and the officer, jailor or guard negligently permits an escape or a rescue, the fine on conviction is a sum not to exceed five hundred dollars. Id. arts. 205-6; Clark's Crim. Law of Texas, p. 66. These articles are found in chapter 4, title 8, of the Penal Code. In the same chapter are found several definitions, and among them the following: "By 'officer' as used in this chapter is meant any peace officer, as sheriff, deputy sheriff, constable of a beat, marshal, constable, or policeman of a city or town, any jailor or guard, or any person specially authorized by warrant to arrest." Penal Code, art. 227.

So that where a jailor, being an officer within the meaning of article 227, is charged with the custody and safe-keeping of a person who has been accused or convicted of a capital offense, shall negligently permit such person to escape or to be rescued, he is charged with the performance of a duty imposed by law, and if he negligently permits such person to escape he is guilty of a violation of law,—a *misdemeanor* punishable by a pecuniary fine not to exceed two thousand dollars, and hence an offense of which the District Court has original jurisdiction to try and determine, agreeably to the manifest intent and meaning of that portion of sec. 8, art. 5, of the Constitution cited above.

In our opinion the language of the Constitution, as follows: "The District Court shall have original jurisdiction in criminal cases of the grade of felony; of all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; in cases of misdemeanors involving official misconduct," as well as suits for slander and suits for the trial of title to land and the other matters of jurisdiction mentioned in sec. 8 of the judiciary article of the Constitution (article 5), is too plain to admit of or require construction or interpretation. By this section suits for the trial of title to land, suits for divorce, and criminal cases of the grade of felony are all placed in the same category as cases of misdemeanors involving official misconduct. The jurisdiction as to one is the same as the others, and is as exclusive in the one as the others. The provision of section 16, article 5, which gives to the County Court "original jurisdiction in all misdemeanors of which exclusive original jurisdiction is not given to the justice's court, as the same are now or may be hereafter prescribed by law, and when the fine to be imposed shall exceed two hundred dollars," must be held to relate to other misdemeanors than such as involve official misconduct, for the reason that jurisdiction of this class of misdemeanors is conferred by name on the District Court. If it were necessary to find a reason for this application of the plain words above quoted, we are of opinion that it would be found in the fitness of things. Jurisdiction to try unnamed offenses of the grade of felony having been specially conferred on the District Courts, it was, we are of opinion, eminently proper that all cases of official misconduct, whether of the grade of felony or misdemeanor should be tried in the District rather than in the County Court, in view especially of the fact that official misconduct of the character of that with which the defendant is accused is punished by law as a felony or as a misdemeanor according as the testimony shall show that the act which constitutes the offense was committed *wilfully* or *negligently*.

We are aware that in *Watson* v. *State*, 9 Texas Ct. App. 212, an interpretation was given to the clause of the

Constitution under consideration, and an application given to certain provisions of the statutes, variant in some respects from the present opinion. In Watson's case it was held by this court in effect that an officer could not properly be held to have forfeited his right to the office on account of official misconduct in the manner of discharging its duties, and as an incident to the case be removed from office, when the offense charged amounted simply to negligence and involved no moral turpitude; in other words, that the law never contemplated that the officer should be removed from office for a negligent failure to perform its duties, and that the severe and disgraceful punishment of removal from office should only follow a wilful failure to discharge its duties. This was the principal point of inquiry, and in that respect and to that extent we still adhere to the opinion expressed in Watson's case. But in so far as that case relates to the jurisdiction of the County Court to try that character of misdemeanors is concerned, we are of opinion, upon a careful reconsideration of the subject, that the rule there laid down was erroneous and must be overruled. The error is one likely to be productive of much mischief and should be corrected at the very earliest opportunity. It is preferable that the error should be corrected than persisted in simply for the sake of seeming consistency In correcting errors of others we should be as willing to correct our own. The ruling in Watson's case will be so modified as to conform to this opinion. Sec. 22 of the judiciary article of the Constitution authorizes the Legislature to increase, diminish or change the civil and criminal jurisdiction of the County Courts, and in case of such change of jurisdiction to so regulate the jurisdiction of other courts as to conform to the change made in the jurisdiction of the County Court; but there is no such power conferred to interfere with the constitutional jurisdiction of the District Courts, and neither the courts nor the legislature have any power to change the plain letter and spirit of the Constitution to the dotting of an *i* or the crossing of a *t*. What is there plainly written must be observed and obeyed by legislatures and courts until the sovereign power which ordained the organic law shall see proper to change it, any *dictum* to the contrary notwithstanding.

The judgment of the County Court being rendered without jurisdiction, is a nullity and will be set aside. The order of the District Court transferring the case to the County Court, being the only way by which the County Court acquired jurisdiction, was a fundamental error, and being erroneous will be reversed, set aside and held for naught, and the case will be remanded to the District Court of Falls county for trial; and the district clerk will notify the County Court of this decision, for its observance.

Reversed and remanded.

J. R. LOONEY *v.* THE STATE.

THEFT — INSANITY — CHARGE OF THE COURT.— When in a trial for theft the defense is the insane propensity to steal known as kleptomania, and there is evidence tending to sustain that defense, the charge to the jury should distinctly present and specifically treat of the peculiar issue thus raised, and not stop with submitting the usual test of the defendant's ability in general to distinguish right from wrong. See the opinion for considerations pertinent to the question.

APPEAL from the District Court of Montgomery. Tried below before the Hon. JAMES MASTERSON.

Appellant was indicted for the theft, on October 8, 1877, of a suit of clothes worth $8, a suit of boys' clothes worth $9, a pair of pants worth $2, three coats worth $3.25 each, one coat worth $1, two shirts worth $3.50 each, one shirt worth $2.50, a pair of cuffs worth 50 cents, a box of crayons worth 50 cents, two boxes of collars worth

25 cents each, two boys' hats worth 75 cents each, two bottles essence of lemon worth 25 cents each, three bunches of lamp-wicks worth 25 cents each, a pair of scissors worth 50 cents, ten coat hooks worth 75 cents, and one knife worth 25 cents, the property of W. T. Nobles. The jury found the appellant guilty, and assessed his punishment at a term of two years in the penitentiary.

Nobles was a merchant in the town of Montgomery, and at his invitation the appellant occupied an upstairs room in the store, and was entrusted with a key to the store-room. About October 1, 1877, Nobles missed a suit of clothes, and within a few days a pair of boys' boots, which latter articles he found in the possession of a boy who was attending a school taught by the appellant. The boy said that he got the boots from the appellant, and this disclosure led to the examination of the latter's trunk by Nobles, and to the discovery in the trunk of the several articles described in the indictment.

The defendant had previously borne an excellent reputation, and Nobles deferred charging him with the offense or speaking of it to others for several days, suffering in the meantime much mental distress. After much reflection he spoke to Parson Littlepage and the two devised the means whereby the matter should be investigated. Pursuant to their scheme Littlepage went with the defendant to his room and engaged him in conversation, and presently Nobles appeared and charged the defendant with possession of the stolen goods. The defendant denied that he had them and told Nobles to examine his trunk, and informed him where the key could be found. He declared that such goods as would be found in the trunk had been sent him by his father, and that he could produce receipts or papers showing his rightful possession of them. During this part of the dialogue, Nobles' clerk, Dupree, came into the room. Nobles took the goods from the trunk and showed them to defendant, who then said that they were Nobles' property.

The cross-examination of this and the other witnesses to these facts disclosed that when the defendant confessed to these facts, and after indulging in a few moments of apparent study, he said that the explanation of the matter was that from boyhood he had been afflicted with an ungovernable habit of appropriating articles of property belonging to others, many of them articles for which he could have no possible use, such as photographs of entire strangers, combs, brushes, books, and could not tell how, when or where he came in possession of them.

The general current of the evidence bespoke the opinions of the witnesses that he was not strong of mind, many in his behalf declaring that they believed him incapable of comprehending the right or wrong of moral action; and this appears to have been the sole defense relied upon. An eminent divine, who was also a medical expert, and who had studied the case, declared his belief in the mental incompetency of the defendant.

J. R. Peel, for the appellant, filed an able brief.

H. Chilton, Assistant Attorney General, for the State. The defense was rested on the ground of insanity — moral insanity.

The charge of the court, if it contains error, impresses me as erring in defendant's favor. It first sets forth the general doctrine that defendant could not be convicted if he was "unable to distinguish between right and wrong." This instruction is in conformity to the rule announced repeatedly by this court. *Warren* v. *State*, 9 Texas Ct. App. 619; *Clark* v. *State*, 8 Texas Ct. App. 359; *Williams* v. *State*, 7 Texas Ct. App. 163.

In addition the court gave a special charge to the effect: "that if the defendant did take the goods of W. T.

Nobles, at the time and in the manner charged, but at the time of committing the act was laboring under such a defect of reason, *as not to know the nature* and *quality of the act he was doing*, or if he did know it, that he did not know *that he was doing wrong*, then you will acquit." Now, the general charge, taken in connection with the special request, accurately follows the rules indicated by this court, and it is submitted that where district judges in good faith pursue the course antecedently marked out, they should be sustained, except upon clear and undoubted conviction of error.

The second special charge given by the court distinctly recognizes the theory of "moral insanity," and as a part of this theory the effect of "morbid action," as sufficient cause of acquittal. It is not believed that these fallacies have ever been, or can be, sanctioned by the appellate courts of this State. The English courts have emphatically condemned the idea, and adhere to the test: "Did defendant know what he was doing? Did he also know that what he was doing was wrong?" Watson's case, 1 Whart. & Stille Med. Jur. § 166; Edwards' case, 1 Whart. & Stille Med. Jur. § 173. In the United States, the doctrine has been rejected, by nearly all the States — by the most eminent jurists — upon the most deliberate consideration. 1 Whart. & Stille Med. Jur. § 174.

So too with the fallacy of "kleptomania," which is found in the refused instructions coupled with the observations as to general "*moral insanity.*" This form of mania finds no approval in the courts of English speaking countries — independent of its manifestation in persons mentally insane. While it is sometimes observed as a characteristic of insane persons, just as other eccentricities, and perversions of nature and education, still as a peculiar mania, as a form of irresponsibility, disassociated with general mental unsoundness, it is universally held punishable as a crime. 1 Whart. & Stille Med. Jur. § 592.

WINKLER, J. This appeal is from a judgment of conviction of theft of property over the value of twenty dollars. From the evidence and the charges of the court, given and refused, we are led to conclude that the only defense relied on in the court below was kleptomania, and if there was error in the charge of the court, and prejudicial to the rights of the defendant, under this defense and the testimony on that subject, such error is to be found in applying the facts to the general subject of insanity rather than in applying it directly and specifically to the peculiar condition of the defendant's mind developed by the proofs; and in this respect we incline to the opinion that the charge, taken as a whole, was defective in not giving to the jury a special charge on the subject of this peculiar symptom, as it relates to the general subject of insanity.

It is said that kleptomania occurs not unfrequently as a symptom in mania and the mental confusion incidental to it, and in depression and delirium, in which its consideration involves less difficulty. But where it occurs in cases of concealed insanity, its discovery is not easy. Wharton & Stille's Med. Jur. § 192. To our minds, what has been said by Ellinger and quoted in the authority just cited, in the nature of practical directions, may well be considered in connection with the case and the subject under consideration, not as law but as illustrating the propriety if not the necessity of a charge to the jury on this peculiar feature of the case,—as follows: "1. In the earlier developments of mania, kleptomania is an important symptom; it will, however, be found accompanied more or less by other symptoms of incipient derangement, such as a general alteration in the accustomed mode of feeling, thinking, occupation and life of the individual, a disposition to scold, dispute and quarrel, to drink, and to wander about busily, doing nothing, and the bodily signs of excitement (restlessness, want of sleep, rapid pulse, etc.). 2. Kleptomania continues after the disease, to all external appearances, has ceased. Here the disease also has not yet terminated, which can only be indicated by a return of the original state of thought and feeling. (This calls for a continued course of observation by the examining physician.)

"3. There are distinct but occult hallucinations at work. These are to be assumed the more readily the more bizarre and exclusive is the desire to steal, and the more the objects to which it is confined are out of proportion to the property of the thief; and particular attention should be paid to the existence, present and past, of other symptoms of insanity." An instance of this inordinate propensity to steal is cited in this connection from Dr. Rush, who says, "In one instance a woman was exemplary in her obedience to every command of the moral law, except one,—she could not refrain from stealing." We make these further quotations from this authority, as indicative of this peculiar symptom of insanity. "It would be difficult to prove directly that this propensity, continuing as it does through a whole life, and in a state of apparently perfect health, is, notwithstanding, a consequence of diseased or abnormal action in the brain, but the presumptive evidence in favor of this explanation is certainly strong. First, it is very often observed in abnormal conformations of the head, and accompanied by an imbecile condition of the understanding. * * * An instructive case has been lately recorded in which this propensity seems to be the result of a rickety and scrofulous constitution."

We mention these peculiarities in order to show the fact that kleptomania is a recognized symptom of mania, in some of its recognized forms at least, and to illustrate the importance—this being the peculiar defense,—of embracing in a general charge on the subject of insanity, this peculiar symptom,—a feature of the present case to which proper attention seems not to have been paid on the trial below, and which in our opinion would have been more fully developed if the attention of the jury had been called more pointedly to this feature of the defense.

Other questions are presented by the record and have been discussed in argument, but are not considered by this court, not that they are unimportant or immaterial, but because if they are errors they are susceptible of easy correction on another trial. Because of what we deem a material defect in the charge, as above indicated, the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

JOHN WILLIAMS *v.* THE STATE.

1. **CONFESSIONS.**—It is a general rule that statements made by the accused after his arrest, unless he is warned as provided by art. 750, Code of Crim. Proc., cannot be received in evidence against him.
2. **SAME.**—It is now a settled principle of law that when the confession of a main fact is inadmissible, confession of collateral facts tending to establish the main fact are likewise inadmissible. See this case for an application of the rule.

APPEAL from the District Court of Washington. Tried below before the Hon. I. B. MCFARLAND.

The indictment charged the theft, in Washington county on the 7th day of February, 1880, from Tom Dever, of one bay horse, and three bay mares. The verdict found the appellant guilty, and assessed his punishment at a term of five years in the State penitentiary.

The only question in dispute in this case was the admission in evidence of the statements of the accused to the officer after his arrest, without being first warned that they could be used against him on his trial. One statement was that he got the horses from a Mexican, another that he got them in Colorado county, and still another that he got them from a negro. These statements were admitted over the defendant's objection.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Over objection of defendant the State was allowed to prove the statements made by him to the deputy sheriff of Fort Bend after his arrest and whilst in custody of that officer, with regard to the manner and the persons from whom he, defendant, had acquired possession of the stolen horses. He was under arrest at the time these statements were made, and was not warned or cautioned as is required by statute to make a confession so made admissible as evidence. Code Crim. Proc. art. 750. But it is said the statements so made were not confessions in fact, but independent statements not only not amounting to confessions of guilt but on the contrary made as defendant supposed in his own interest. The State, however, was seeking to use them for the purpose of showing that defendant had positively contradicted himself in these statements, with regard to the persons from whom he had acquired said horses, and in that manner establish his guilt by his own declarations.

The rule is now well settled in this State, that when the confession of a main fact is inadmissible a confession of collateral facts tending to establish the main fact is likewise inadmissible. *Haynie* v. *State*, 2 Texas Ct. App. 168; *Taylor* v. *State*, 3 Texas Ct. App. 387; *Marshall* v. *State*, 5 Texas Ct. App. 273; *Nolen* v. *State*, 9 Texas Ct. App. 419; Clark's Crim. Laws of Texas, art. 1570, and note.

For error in admitting the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

W. H. WILLIAMS *v.* THE STATE.

1. CONTINUANCE.— Under our present Code the granting or refusal of an application for a continuance, whether the first or a subsequent one, based upon the absence of witnesses, is confided to the discretion of the trial court, and is no longer a matter of right. If, however, after trial and conviction, it appears that the evidence upon which the refused application was based was material, and probably true, a new trial should be granted. See this case for the distinctions between the old and new Codes on this subject.
2. DYING DECLARATIONS — CASE STATED.— In a prosecution for murder, a witness stated that he approached the deceased immediately after the fatal shot was given, and asked him "what is the matter with you?" to which he replied "Jack Williams shot me." It was also in proof that the defendant was commonly known by the nickname "Jack Williams." After the witness had left the stand the defense moved the court to withdraw this evidence from the jury, upon the ground that it was not alleged that Jack and W. H. Williams, the defendant, were one and the same person. *Held*, that even if the objection had been interposed at the proper time, it would not have been tenable, as the answer to the question was so clearly interwoven with the transaction, being given after the deceased had sunk down in his death agony, and immediately preceding his death, that it was admissible as part of the *res gestæ;* and *held*, further, that the evidence showing that Jack and W. H. Williams were names commonly applied to the defendant, it was not necessary that the indictment should allege them to be one, to let in the proof, and therefore there is no variance between the *allegata* and *probata.*
3. NEW TRIAL.— Absence of counsel is no cause for new trial. See the opinion for peculiarity of a motion based on this ground.
4. PRACTICE.— Objections to the service of the special *venire* must be taken at the proper time in the court below, and, to authorize an inspection by this court, the facts must be presented by proper bill of exception.
5. CHARGE OF THE COURT — MANSLAUGHTER.— See the opinion *in extenso* for a charge upon manslaughter requested by the defendant, but properly refused because the charge was not warranted by the evidence.

APPEAL from the District Court of Tom Green. Tried below before the Hon. A. O. COOLEY.

The indictment charged the appellant with the murder of John Anderson, in Tom Green county, Texas, on the 4th day of December, 1880. His trial resulted in his conviction of murder in the first degree, and the death penalty was assessed. The evidence was brief and is embodied in the opinion substantially as given by the witnesses.

No brief for the appellant. *H. L. Bentley* and *Walton, Green & Hill* appeared in his behalf in a motion for rehearing, which was overruled.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. In the District Court of Tom Green county, on April 22, 1881, the appellant was convicted of the crime of murder in the first degree, and the penalty of death was assessed by the jury impaneled for his trial on an indictment which charges the appellant with the murder of one John Anderson in Tom Green county, on December 4, 1880. The indictment was presented by the grand jury and filed on April 19, 1881. On April 22, 1881, the defendant below filed a sworn application for a continuance, in which it is stated that he could not safely go to trial at that term of the court, for the want of certain witnesses, named in the application, the materiality of whose testimony is set out in the application for continuance substantially as follows: "Defendant expects to prove, by Charles King, that before the alleged killing of John Anderson, deceased, he, witness, took charge of the defendant and brought him from the town of San Angelo to Fort Concho, while the defendant was in a state of intoxication. By John Cisco, that he, witness, was present at the time of the alleged killing, and that the defendant was not present at the killing. By Corporal Jackson, that he, witness, found the defendant in bed after the time of the alleged killing of the deceased. By Scott Ford, that he, witness, was present at the time of the alleged killing of the deceased, and that the defendant was not present at the alleged killing. The application for a continuance was overruled by the court, and the defendant's counsel reserved exceptions.

The main features of the homicide, as gathered from the evidence of witnesses who testified at the trial, may be briefly stated as follows: On the night of the killing the deceased had been engaged in "dealing monte" under a shed in the rear of the barracks of Company D, 10th Cavalry, U. S. Army, at Fort Concho, Tom Green county. The shed, it seems, is situated between the main quarters and the mess-room of the company. At a little distance from Anderson's situation and under the same shed was another game of monte, at which one Mason was dealing. The defendant and others were betting at Anderson's table. The two games of the deceased and of Mason had been in progress "all the evening." One witness testified that a little while before the killing, he, the witness, went to his stables and locked the door and then returned to the place where the games were going on. He says: "I passed in at the west end of the large building in front of the mess-room and shed aforesaid, and walked through it till I got to the north door, just in front of where deceased, Anderson, was dealing monte, when I left. As I got to the door with my foot on the door-sill, I saw the deceased, Anderson, standing up before his table, between the table and the wall of the mess-room; he had put away his money and was in the act of putting away his cards. The defendant was standing in front of Anderson, and close to him, not farther than two or three feet. I heard the defendant say to Anderson, 'ain't you going to deal any more?' Anderson replied, 'no, I am going over to Angelo.' Defendant then said, 'you have got two dollars and a half of my money.' Anderson replied, 'yes, but I won it, and if you will come over to town I'll give you a chance to win it back. I am going to deal over there.' The defendant said, 'you're not going by a damned sight;' and as he said that he stepped back a step and drew his pistol, an army six-shooter, and shot the deceased Anderson. When he shot the first shot, Anderson was standing up, but at the fire he fell back on his chair just behind him, and his head fell back, and his arms fell down by his side, and I could see the blood coming out of his breast. The defendant then said, 'take that,' and shot the deceased twice more. Whether he hit him or not, the second and third fires, I don't know. I remained standing in the door-way until the defendant passed by me with his pistol in his hand, going into the main quarters."

Another witness says he was standing near the monte table of Mason under the shed when the deceased was killed. When the first shot was fired, this witness says he ran around to the north end of the mess-room, and while there heard two more shots fired in quick succession, and he went around under the shed again and saw the deceased gasping between his table and chair, and took hold of him and asked him what was the matter. The deceased said, "Jack Williams shot me." This witness testified that the defendant is known by the nickname of Jack Williams and commonly called Jack Williams, and he fixes the date of the occurrence as on the night of December 4, 1880, between seven o'clock and half-past eight o'clock, and the place at Fort Concho in Tom Green county, Texas. This witness testified further that the deceased had no arms upon his person, that he examined him, and that he lived but a few seconds after the witness took hold of him, and that deceased tried to say something more but could not. Witness says he laid him down, opened his clothes and saw a wound in the breast.

A medical witness testified that he knew the deceased and examined him on or about December 4, 1880; that he came to his death from the effects of a pistol shot in his breast, and is now dead. The foregoing is substantially the testimony for the prosecution; none was offered by the defendant. The witnesses for the State testify positively and clearly as to the facts about which they speak, and no question is presented as to their entire credibility.

Thus much as to the testimony adduced on the trial as well as the materiality of the testimony of the witnesses on account of whose absence a continuance was sought, in order to ascertain and be understood in passing upon the action of the court below in overruling the application for a continuance in the first instance, and secondly, in refusing a new trial, on account of the alleged absent testimony, under the provisions of subdivision 6 of article 560, Code Criminal Procedure, wherein it is among other things declared that the truth of a first or any subsequent application (for a continuance), as well as the merit of the ground set forth therein, and its sufficiency, shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right; *provided* that, should an application for a continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted. In order to avoid confusion in the application of this statute, it must be borne in mind that it is of recent enactment, and is not to be confounded with previous enactments and decisions thereunder, in which the courts under those former statutes uniformly held that where a first application for a continuance by a defendant in a criminal prosecution met all the requirements of the statute, the courts had no discretion in the matter, and a continuance in such a case was granted as a matter of right. Instances of this character under former laws may be found in *Dinkins* v. *State*, 42 Texas, 250, *Shackelford* v. *State*, 43 Texas, 138, and *Peeler* v. *State*, 2 Texas Ct. App. 455, and cases there cited. These cases, however, afford no rule applicable to the present statute, which is of more recent date than any of these decisions.

To our minds, the Legislature intended to change the law and avoid the interpretation given to it, by enacting the provision clearly embodied in the article quoted, to the effect that, "the truth of a first or any subsequent application, as well as the merit of the ground set forth therein, and its sufficiency, shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right." By the *proviso* appended, it was the evident intention of the lawmakers that whilst an application for a continuance was confided to the sound discretion of the court who was called to pass upon the application, it was not designed that the party should be remediless. On the contrary, if it should appear upon the trial that the evidence of the witness or witnesses named in the application for a continuance was of *a material character*, and that the facts set forth in the application were *probably true*, then the law requires that the party shall have his remedy by requiring of the court that a *new trial* shall be granted. Hence, whilst in the first instance the granting or refusing a continuance is confided to the sound discretion of the trial court, it would seem that after the trial has been concluded, and the testimony has been developed, if it shall then appear to the trial court that the evidence of the witness or witnesses named in the application for a continuance was, 1, of a material character, and 2, that the facts stated in the application were probably true, in such a case the law demands that a new trial be granted.

In determining this question as to whether a new trial should be granted, the trial court in the first place, and this court on appeal should look to all the testimony, as well that given on the trial as that set out in the application for a continuance, in order to determine whether the facts set forth in the application were, first, of a material character, and, secondly, were probably true, and as this inquiry shall result, the one way or the other, the new trial should be granted or withheld.

Applying these conclusions to the present inquiry, the court below having refused to grant a continuance when first applied for, and having also refused to grant the defendant a new trial after his conviction, the inquiries to be made by this court are, first, whether the court below abused the discretion confided to it by the law in overruling the defendant's application when first presented, and secondly, whether the facts set forth in the application, that is, the testimony it was expected to obtain from the absent witnesses, was material in its character, and also whether the alleged facts were probably true.

With reference to the first inquiry we are unable to say that from anything contained in the record and upon which an opinion can be based, the court abused its discretion. The diligence, aside from verbal criticism and in view of the fact that the defendant made his application for a continuance within three days after the indictment was found, would seem to have been sufficient in ordinary cases. Still we are of opinion that the facts stated were not material, as required to be stated in a first application by a defendant, in art. 560, clause 3, Code Crim. Procedure.

As to whether a new trial should have been granted or not, on the ground of overruling the application for a continuance, we are of opinion the court did not err. If the testimony expected to be obtained from the absent witnesses, as set out above, be considered in connection with the testimony adduced on the trial, we are led to the conclusion not only that the testimony was not of a material character, but that it is very questionable, to say the least, whether it was not probably untrue; and this being the case we cannot say that there was any legal obligation resting upon the court below to grant a new trial, or that there is anything presented in connection with the subject which would warrant this court in reversing its rulings in the premises.

In a second bill of exceptions it is recited that, after a State's witness had testified that the deceased was asked what was the matter with him, and answered "Jack Williams shot me," the question and answer were just before the death of the deceased, and that the witness also stated that Jack Williams was a nick-name by which W. H. Williams, the defendant, was commonly known and called. The bill recites that after the witness had left the stand defendant moved the court to instruct the jury not to regard the statements as to Jack Williams, it not being alleged in the indictment that Jack Williams and W. H. Williams, the defendant, are one and the same person. The motion was heard and overruled, and the ruling was reserved.

In this we see no error. If objection had been made to this testimony at the proper time, that is, when it was offered, the objection ought to have been overruled. The response made by the dying man to the question of the witness "what is the matter with you?" to wit, "Jack Williams shot me," was admissible as *res gestæ*. From the testimony in this connection it is apparent beyond cavil, that at the time the question was asked and the answer given, the death wound had been inflicted, and the deceased had sunk down in a dying condition, and could not speak further, though desiring to do so, and that an interval of but a very few minutes of time, at most, could have elapsed from the firing of the first shot until the deceased was a dead man. If the answer of the deceased was not *res gestæ* under the circumstances, then we are of opinion there can be no such thing. The evidence was so interwoven with the transaction as to be inseparable from it, and necessarily formed a part of it as seen, heard and related by the witness, and was in our opinion clearly admissible. Wharton's Crim. Ev. § 276; *Boothe* v. *State*, 4 Texas Ct. App. 202; *Warren* v. *State*, 4 Texas Ct. App. 619, and authorities there cited. The remainder of the testimony of the witness, to the effect that the defendant was called and known by the nickname of Jack Williams, is equally unobjectionable. It was unnecessary that the indictment should have contained the averment in order to let in the proof. The important fact to be ascertained was this, Was the person named in the indictment the identical person who perpetrated the deed? In this respect there is no room for controversy; the defendant was identified in court by the testimony as the person who fired the shot by which the deceased was deprived of life. If the defendant had been indicted by one name, and the proof had shown that he was known by that name and also by another, there would have been no fatal variance between the *allegata* and the *probata*. *Cotton* v. *State*, 4 Texas, 260; *Owen* v. *State*, 7 Texas Ct. App. 329. The court did not err in refusing to instruct the jury as requested by the defendant's counsel in regard to this testimony.

Other grounds besides the overruling of the defendant's motion for a continuance are presented in his motion for a new trial. Among the grounds stated is an affidavit of the attorney appointed by the court to represent the defendant on the trial of his case, to the effect that prior to his appointment he had been employed to represent another person before another court, and was compelled, because of his prior engagement, to leave this case and the court in which it was tried; that he knew of the preparation which had been made for the defendant's trial, and relied implicitly on his being able to procure a continuance, and was confident that it would be granted; and, relying upon this, before leaving, he procured the services of two other attorneys to apply for the continuance, but, believing a continuance would not be denied, the other attorneys were not minutely advised as to the merits of the defense. If the attorneys procured to represent the defendant did not represent him, not only on the hearing of the application, but throughout the trial (the name of one of them appears to the assignment of errors), then the record does not disclose the fact; or if there is any question as to their competency to represent the defendant throughout the trial, such fact is not apparent. If counsel appointed to represent the defendant, or substituted for that purpose, had not had opportunity to converse with the defendant, correct practice would have required the court, on the fact being made known to it and request made, to have granted a reasonable time, consistent with the business before the court and the length of time at its disposal. Nothing of the kind is shown to have been done, and, in the absence of anything appearing to the contrary, it is but reasonable to presume that the counsel not only represented the defendant throughout the trial, but that they were competent to do so as effectively as the one at first appointed by the court. At any rate it does not appear that the defendant was tried without counsel. *Boothe* v. *State*, 4 Texas Ct. App. 202.

Objection is made to the service of the special *venire*, and it is stated in the assignment of errors that it is not shown by the record that service had been made on the defendant one entire day before the trial commenced. If there was any error in those matters, it should have been taken advantage of at the time, and if there was any ruling desired to be presented in this court on the hearing of the appeal, the matter should have been presented by proper bill of exceptions. This not having been done, we find no ruling of the court below so presented by the record that it can properly be inquired into here. The same may be said as to the charge of the court being partly printed, in the absence of any fundamental error being apparent. The jury were instructed in a manner not calculated to mislead on murder of the first and of the second degrees, with an explanation of express and implied malice, and were given appropriate instructions as to the verdict in case the jury should find the defendant guilty of either degree of murder, and were given in charge the legal presumption of innocence, and the reasonable doubt as between the two degrees of murder, and as to the whole case, and were advised in the conclusion of the charge that if they had a reasonable doubt of the defendant's guilt they would acquit him. The court did not charge on any other grade of the offense than the two degrees of murder. The defendant's counsel asked a charge on reasonable doubt which the court had already given in plain terms, and also requested the following charge on manslaughter which, like the first, the court refused: "If you believe from the evidence that at the time of the killing the defendant was in an excited condition of mind, owing to the fact that the deceased had defendant's money and refused to return it to defendant, and that defendant became suddenly angry at the deceased, and, under the sudden passion or anger, inflicted the fatal wound upon the deceased, you will find him guilty of manslaughter."

The testimony, as we find it in the record and substantially as set out above, did not call for a charge on manslaughter. There was no adequate cause shown for such anger as would reduce a voluntary malicious killing from murder to manslaughter, and the court did not err in refusing to give the desired instruction to the jury.

It is always a source of regret with this court to have to pass finally upon a capital felony when no counsel appears to represent the appellant, as is the case at present. We have, however, given to the case as presented by the record before us that attentive investigation and careful consideration its importance demands, and are constrained to say that for aught that appears the appellant has had a fair and impartial trial, conducted in substantial compliance and with due regard to the demands of the law, and in which all the rights the law guarantees him have been accorded him. The indictment is sufficient to support the judgment, and the testimony is amply sufficient to support the finding of the jury and the judgment of the court below. This being the case, it only remains for us to affirm the judgment of the District Court, and it is accordingly so ordered.

Affirmed.

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HENRY McGREW v. THE STATE.

1. **PRACTICE — CHARGE OF THE COURT.**—However slightly an insufficient or erroneous charge of the court may tend to injure the rights of the defendant, it is cause for reversal if excepted to at the proper time.
2. **SAME — ALIBI.**—When the defense relied upon is *alibi*, it is the duty of the court to explain its nature and character to the jury.

APPEAL from the District Court of Fort Bend. Tried below before the Hon. W. H. BURKHART.

The conviction in this case was based upon an indictment charging the appellant with the rape of Patsey Henricks, a female child, under the age of ten years. The jury found him guilty of an assault with intent to commit rape, and assessed his punishment at four years in the penitentiary. The parties were colored people.

Mitchell & Peareson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. At the time the charge of the court was given to the jury the appellant excepted to the same for insufficiency, and his bill of exceptions is incorporated in the record. The rule is that whenever exception has been taken to the charge and on examination the charge is found insufficient, the fact that the exception was taken promptly and in time will necessitate a reversal, however slight may appear the tendency to injure the defendant's rights. Code Crim. Proc. art. 685; *Vincent* v. *State,* 9 Texas Ct. App. 303; *Whaley* v. *State,* 9 Texas Ct. App. 305.

In the case before us the defense was solely an *alibi.* We examine the charge in vain for any instruction to the jury based upon this defense, or any instruction at all connected even remotely with it save in so far as the reasonable doubt of guilt might embrace it. The rule is that when *alibi* is the defense relied on solely, it is not only competent but proper for the court to explain to the jury its nature and character. *Deggs* v. *State,* 7 Texas Ct. App. 359.

Because the charge of the court failed to explain the law applicable to the sole defense interposed, and the same was excepted to at the time, the judgment is reversed and the cause remanded.

Reversed and remanded.

H. L. ELLIS *v.* THE STATE.

1. **EVIDENCE — NEW TRIAL.** — See this case for evidence held insufficient to sustain a verdict of conviction for theft, wherefore a new trial should have been granted.
2. **SAME.** — If the testimony of a co-defendant be material and has become available by his acquittal, the want of it may constitute cause for a new trial.

APPEAL from the District Court of Uralde. Tried below before the Hon. T. M. PASCHAL.

The indictment charged the appellant and one Dimmick jointly with the theft of 60 head of sheep. The trial of the appellant resulted in his conviction as charged, but found that he voluntarily returned the property within a reasonable time, and before the institution of this prosecution, and assessed his fine at $25.

William Lewis testified, for the State, that about the 4th or 5th of April, 1879, he counted a flock of sheep which he owned, and found that 71 head of mutton sheep were missing. On April 7th he went to the sheep-camp of Dimmick, the co-defendant of the appellant, about ten miles distant from the witness' sheep-camp, and was by Dimmick shown through his flocks, but found none of the missing sheep. He asked Dimmick where his (Dimmick's) yearling sheep were, and was told by him that he had sold them. On Turkey creek witness was told by Cline that the yearling sheep were in the charge of Ellis at the Gatto Ranch, five or six miles distant from Dimmick's. The witness went there but failed to find his sheep. On the next day the witness again went to Dimmick's and found him and a Mexican removing their camp. Dimmick told the witness that Ellis would let no stray sheep into his flock and that it was of no use to search for the missing sheep there. Afterwards, but during the same day, Dimmick told the witness that in his flock were two black yearling sheep which belonged to witness, but which, witness having overlooked them, he said nothing about. Witness told him that he was not looking for black yearlings, but for 71 head of mutton sheep. On the next day the witness went to the camp to which Dimmick had removed, and was there told by him that Ellis and his flock could be found at the Horrace Ranch on the Nueces. Witness asked Dimmick to go with him and assist in finding the sheep, but Dimmick, pleading press of time, declined. The witness reached Ellis' late that evening, and was informed by him that he had found the lost sheep, in two bunches, on his way from Turkey creek. The witness asked why he had not told Dimmick, so as to save the witness so much hard riding. He replied that he had not seen Dimmick, but that on reaching Horrace's Ranch he had dispatched a note to witness by one of Horrace's boys, informing him that he had found the sheep. The witness could not identify the note shown him, as he was unable to read writing. He found sixty head of sheep where Ellis had penned them at Horrace's Ranch. Had never found the others. Those found were worth $2 per head,— in the aggregate $100 at least.

Cross-examined, the witness said that he had a herder in charge of his sheep when the ones lost were missed. He had often known sheep to stray off when in charge of herders. He did not know how these got away. The cross-examination developed nothing else material to the case. On re-direct examination, the witness stated that he did not know that his sheep were in Ellis' flock, but he intended to examine every flock in the country until he found them. Ellis set up no claim to the sheep, and had them separated from his own flock and in a separate pen when witness reached the Horrace Ranch, where they were. Ellis was without water or provision, and the witness divided his with him. On the next morning, when witness was preparing to leave, he recognized another of his sheep in Ellis' flock, and pointed it out. Ellis went into the flock, caught and delivered it to the witness. He set up no claim whatever to the sheep. The sheep lost were marked with smooth crop off of left ear.

The defendant acknowledged the writing of a note which read as follows:

"March 10th, 1879.

MR. LEWIS, Sir:— Yesterday, as I came from Turkey creek, there was two small bunches of sheep run into my flock, one in the forenoon, and one in the afternoon, about 2 1-2 miles this side of the creek. Not knowing the sheep and seeing they had the scab very bad, I put my sheep in the shade and went back to get the advice of Mr. Dimmick what was best to do with them. He asked me the mark of the sheep; I told him; he said they must be yours, and to bring them on and send you word where they were.

I remain yours,

H. L. ELLIS."

The witness stated that his wife handed him this note, saying that she had received it by the hands of one of the Horrace boys.

H. C. Griner testified for the State that he went to Dimmick's camp on the 2d or 3d of April, 1879, to hire him to go to San Felipe and dip sheep for his (witness') brother. *En route* he passed Dimmick's flock of sheep, in charge of Ellis, and noticed in the flock some 20 or 30 "scabby" sheep, marked with a smooth crop off one ear. Witness thought then that they belonged to Mr. Weymiller, as he marked with a crop off one ear, but said nothing to Ellis about his belief. He remarked to Ellis, "Dimmick told me you had no scabby sheep in your flock," and Ellis replied, "yes, we have a few." Presently Dimmick rode up, and he and witness went to Dimmick's camp and got dinner. Witness remained until late in the evening, but said nothing about seeing stray sheep in the herd. Witness knew Dimmick's sheep as well as he knew his own. Those in the flock spoken of were of a finer grade than Dimmick owned.

Cross-examined, the witness stated that he did not know that the sheep he saw in the flock were the same that Lewis found in the Ellis flock at Horrace's Ranch. Had not seen Dimmick's sheep before since August, 1878.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. As shown by the record the evidence is, in our opinion, insufficient to support the verdict and judgment of conviction; and in view of the meagerness of the inculpatory facts the court should have granted a new trial in order that appellant might have had the benefit of the testimony of H. M. Dimmick, who had been jointly indicted with him, but who had been tried and acquitted subsequent to the conviction of appellant.

Reversed and remanded.

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E. R. O'BRIEN v. THE STATE.

1. GAMING — INDICTMENT — EVIDENCE.— Indictment that charges the accused with permitting a game of cards to be played in a "public place under his control, to wit: a beer saloon," etc., is not supported by evidence that a game was played in a room over the saloon, but which fails to show any connection of the room with the saloon in its business or public capacity.
2. SAME.— The room in which the game is played must be shown to have the inhibited character. It is not necessary that it be in the main business room, but it must be auxiliary to, or used in connection with the business of the principal room.
3. SAME — CHARGE OF THE COURT.— The charge should be confined to the kind of place named in the indictment.

APPEAL from the County Court of Hood. Tried below before the Hon. JAMES HINER, County Judge.

The opinion discloses the case. The fine imposed by the jury was in the sum of $25.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was charged by indictment with unlawfully permitting certain prohibited games, to wit: games with cards in a public place, to be played in a public house under his control, to wit: a certain beer-saloon in the town of Granberry, in the county and State aforesaid, known as the E. R. O'Brien Lager Beer Saloon, and then and there occupied and controlled by him, the said E. R. O'Brien, etc.

The evidence showed that one game of cards was played up-stairs, over the saloon. There was no connection between the lower room and the one up-stairs in which the game was played. The latter was entered by a flight of steps at the rear end of the building, going up from the outside, and has no entrance from the inside. The indictment alleges that a game of cards was permitted in a public place, to wit, a beer saloon. This allegation must be proved as charged. Proof that the playing was up-stairs over the saloon will not support the charge, unless there be some connection shown between the room and the saloon. If defendant used the room in connection with his beer saloon, or the business carried on in the saloon;— if he had sent drinks into the room to the players, thus using it in connection with, and in aid of his business, the allegation that it was a beer saloon would be sustained. The learned judge must have fallen into the opinion of the Supreme Court in *Cole* v. *State*, 9 Texas, 42; *Pierce* v. *State*, 12 Texas, 210; *Redditt* v. *State*, 17 Texas, 610. In these cases it was held that a house for retailing spirituous liquors included the whole house, from cellar to garret, regardless of approaches.

These cases have been overruled, and now the room in which the game is played must be shown to have the inhibited character. It is not necessary that it is in the main business room; if it be auxiliary to, or used in connection with the business of the principal room, this will suffice. *Holzclaw* v. *State*, 26 Texas, 682; *Horan* v. *State*, 24 Texas, 161.

The charge of the court included all of the inhibited houses and places, or nearly so. We would respectfully suggest that the charge of the court be confined to the place or house named in the indictment. The State may have proven that the defendant permitted cards to be played at every other place or house enumerated in the Code, or which comes under the character of a public place, except the one charged in the indictment, and still a conviction would not be legal. This defendant is charged with permitting cards to be played in a beer saloon. This allegation must be proven. Proof that the room in which the game was played was a public room or place, or that it was commonly resorted to for gaming, or that it was a gambling house, etc., will not tend to support the charge.

The verdict having no support in the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

A. JERNIGAN *v.* THE STATE.

1. EVIDENCE — CORROBORATION OF AN ACCOMPLICE. — Proof of the guilty possession or connection of the accused with the fruits of a theft may be evidence strongly corroborative of the inculpatory testimony of an accomplice.
2. SAME. — The acceptance by the accused from a confessed accomplice of a sum of money, imputedly the proceeds of the sale of the stolen property, being a fact relied upon to corroborate the accomplice, it must appear, first, that the money received was in fact proceeds of the sale of the stolen property, and, second, that the accused was not only informed of that fact, but also that the property was stolen; otherwise the possession of the money is not a corroborative circumstance.
3. SAME. — Accomplices in crime cannot corroborate each other, nor can an accomplice testify to one fact and corroborate this by testifying to another.
4. SAME. — To be corroborative, the fact must not only be criminative, but must be shown by the oath of a witness other than the accomplice. If it is so testified to, and tends to connect the accused with

the offense, it is corroborative, whether testified to by the accomplice or not.

5. CIRCUMSTANTIAL EVIDENCE.— Facts or circumstances relied upon to establish the principal fact at issue, or such as are necessary to the conclusion sought, must be proved, otherwise no sufficient foundation is laid for the process of inference or presumption which is to follow. Proof is indispensable at this stage of the trial, and its place cannot be supplied by presumption. See this case *in extenso* for an application of these rules.
6. CHARGE OF THE COURT instructed the jury, * * * "Recent possession or participation in the fruits of the crime are circumstances which the jury may consider, in connection with the whole evidence, in determining the guilty agency in its commission." *Held,* correct as an abstract proposition of law, but, in view of the evidence in this case, error, as assuming as proved a material fact at issue.

APPEAL from the District Court of Brown. Tried below before the Hon. T. L. HUTCHISON.

The indictment charged the appellant with the theft, in Brown county, on the 24th day of May, 1881, of seven head of cattle, the property of Holland Mays. He was found guilty as charged, and his punishment fixed by the jury at five years' confinement in the penitentiary.

After proof by the owner that the cattle named in the indictment were taken without his consent, the State introduced the witness Bruce, who testified in substance that he turned State's evidence of his own volition. Himself and the appellant drove the cattle described, upon the suggestion of the latter, and upon the same suggestion the witness sold them under the assumed name of R. M. Hudson, for $109, which he divided with appellant.

The sale of the cattle by Bruce and payment in part with a $100 bill was proved by L. L. and C. F. Shields, the former of whom purchased them, the latter paying the consideration and drafting the bill of sale.

Rute testified that he changed a $100 bill for the appellant, in the town of Brownwood. Bruce was with the appellant at the time.

I. B. Sadler testified, for the State, that the appellant requested him to defend Bruce before the examining court, and told him that the case was a bad one. This was before the appellant was arrested.

Burns, for the defense, testified that he was present and heard a conversation between Goodwin and appellant in the presence of Bruce. The latter said he would not have testified against the appellant but for his fear of being hung.

L. L. Shields, for the defense, testified that he promised Bruce not to prosecute him further than he might be compelled to, if he would turn State's evidence. The witness did not know the appellant as a partner of Bruce in the trade for the cattle, when he bought them from the latter.

Bud Ratliff testified that he guarded Bruce for six or seven days after his arrest, and told him that he, witness, thought he would come clear if he would turn State's evidence, and promised to help him if he could, and to sign a petition for his pardon if convicted.

The witness Bruce had denied on his examination the facts testified to by the defendant's witnesses Burns, Shields and Ratliff.

The opinion indicates the evidence omitted in this statement.

G. I. Goodwin, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of the theft of cattle, upon the testimony of one Bruce, an acknowledged accomplice.

It will be found from the statement of facts that the State is compelled, to sustain the conviction, to rely upon but one fact which tends to corroborate the accomplice. Bruce, the accomplice, swears that he sold the cattle, and in part pay received a $100 bill, and that defendant got this $100 bill changed at Wood & McCord's store in Brownwood, and divided the money in Skelton's office. Shields, who paid for the cattle, corroborates the accomplice as to the $100,— that is, he let him have a $100 bill.

The witness Rute swore that the defendant, in company with the accomplice, applied to him about the first of June, or the last of May, in the town of Brownwood, to change a hundred-dollar bill, and that Mr. Connor changed it and gave the change to defendant.

This one hundred-dollar bill, being the proceeds of the sale of the cattle, can be and is familiarly termed the fruits of the crime, and occupies the same relation as a means of proof in a great many cases as the possession of recently stolen property does to theft. In this case the bill constitutes the fruits of the theft. It follows, therefore, that if the defendant is shown to have had guilty possession of or connection with this bill, that fact would be a strong corroboration of the accomplice. Two things are necessary, however, to make the transaction criminative; 1st, this must be the bill for which the cattle were sold; 2d, the defendant must not only have been informed of that fact but that the cattle were stolen, thus constituting the bill a fruit of the theft. The proof of neither of these facts can be made by the evidence of the accomplice, for, in law, accomplices are so infamous that they can neither corroborate one another nor swear to a fact and then corroborate this by swearing to another. To be corroborative, the fact must not only be criminative, but its existence must be shown by the oath of some other witness. If it tends to connect the defendant with the offense, and is sworn to by some other witness, it is corroborative, whether testified to by the accomplice or not.

But, to return: What witness has sworn that the bill is the same? To be inculpatory it must be the same. Can we presume it to be the same? Would not this be basing a presumption on a presumption? The reasons assigned in favor of this presumption are that the transaction was about the time of the sale of the cattle, and that the bill from its denomination was noted and unusual, especially in the possession of the defendant. But, concede it to have been the same, did the defendant know the fact? Admit that he did, had he any knowledge that it was the proceeds of the stolen cattle? We are called upon again to presume, thus basing a presumption upon a presumption in the third or fourth degree.

Mr. Burrill, in his most excellent work on Circumstantial Evidence, page 135, in speaking of the facts of the case, says: "We are thus brought to the most important consideration connected with this stage of the inquiry, namely, the *proof* of the facts as circumstances which are to be used as a means of arriving at the principal fact sought. It is an invariable rule that these facts, or such of them as are necessary to the conclusion in question, must be actually *proved*, otherwise no sufficient foundation can be laid for the process of inference or presumption which is to follow." Again, on page 136: "Proof, then, in the strictest sense of the word, is at this stage of the trial indispensable; and its place cannot be supplied by presumption." Let the principal fact be what it may, when sought to be established by other facts or circumstances the rule as stated by Mr. Burrill applies, and the facts relied upon must be proven in the strictest sense of the word. We do not wish to be understood as holding that a presumption cannot be based upon a presumption, but simply that in this case the proposed presumption is entirely too remote. Changing of the bill, within itself, cannot be tortured into a circumstance against the defendant; hence to be such a guilty knowledge must be shown. Can this be inferred from the act of changing the bill? To thus conclude would be reasoning in a circle.

The bill may have been innocently received by the defendant, directly from the hands of the thief (in this case we have an avowed thief), immediately after the sale of the cattle, in consequence of misrepresentation or fraud; "as where he has been requested by the thief to take charge of the article for him a short time," or "to do something with it, for or without compensation." Burrill, p. 564. We are of the opinion that there has not been such corroboration of the accomplice in this case as was required by law to sustain the verdict.

But again, the issue and the vital issue on the trial was whether the defendant was criminally connected with the one hundred-dollar bill. This being the case, let us examine a certain portion of the charge of the court, which is as follows: "Recent possession or participation in the fruits of the crime are circumstances which the jury may consider in connection with the whole evidence, in determining the guilty agency in the commission." Every word of the above is strictly true, and the fact that the evidence tending to show the recent possession and participation was admitted is very high proof of the truth of the proposition. But this charge assumes as a fact the very thing denied, and over which the parties waged their greatest struggle. Was there in this case recent possession or a guilty participation by defendant in the fruits of the crime?—this was the issue. The court assumed for the State the affirmative, and proceeded to apply the law to the facts thus assumed. This, we think, was error. If the charge had been conditional on this point it would not have been so objectionable. See these authorities on the subject: 13 Texas, 133; 1 Texas Ct. App. 466; 3 Texas Ct. App. 294; 8 Texas Ct. App. 115; Id. 173.

The strength of the corrobating evidence will be found discussed in those cases.

For the reasons indicated in this opinion, the judgment is reversed and the cause remanded.

Reversed and remanded.

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Sandy Jones *v.* The State.

1. Indictment.—Article 420 of the Code of Criminal Procedure directs that an indictment shall bear the signature of the foreman of the grand jury, but article 529 expressly provides that the want of such signature shall not constitute cause of exception to the form of an indictment. The validity of an indictment, therefore, is not affected by the failure of the foreman of the grand jury to sign it.
2. Same—Arrest of Judgment.—Exception to an indictment which goes to the form merely, and not to the substance, is not available by a motion in arrest of judgment.
3. Practice—Evidence.—When it appears that the defendant himself, upon the cross-examination of a State's witness, elicited objectionable or immaterial evidence, he cannot be heard to complain of evidence of similar import adduced by the prosecution.
4. Evidence of General Character.—In a criminal prosecution when guilty knowledge or criminal intention is of the essence of the offense, it is competent for the defendant to put his general character in evidence with respect to the offense charged against him. See the opinion *in extenso* on the question.
5. Rape—Charge of the Court—Force.—In a prosecution for rape alleged to have been effected by means of "force and threats," the charge of the court is insufficient unless in defining "force" it defines it as "such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case."
6. Same—Threats.—When the rape is alleged to have been effected by means of "threats," the jury should be instructed that the threats used "must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case."

Appeal from the District Court of Navarro. Tried below before the Hon. L. D. Bradley.

The indictment charged the appellant with the rape of Katy Templeton, laid the venue in Navarro county, Texas, and the date of the offense, January 22d, 1881. He was found guilty upon his trial, and his punishment was assessed at a term of 39 years in the penitentiary.

Katy Templeton, the woman alleged to have been outraged, was the first witness introduced by the State. The substance of her testimony was that she lived in a house with Jennie Ford, on the east side of the railroad. About two o'clock A. M. on Sunday, about three weeks previous to this trial, she was awakened by finding some one in bed with her. Throwing out her hands she felt the face and head of a man, and by the feeling of the hair knew that he was a negro. The witness screamed once as loud as she could, when the man choked her, and said, "if you scream again, I will put you out of the window and kill you, you d—d bitch." He then crammed one handkerchief into her mouth, tied another around her mouth, and ravished her. The witness screamed no more, but struggled as long as she could. After staying with the witness about two hours, the defendant got up and made the witness open the door. He then took the handkerchiefs from around her head and mouth, and out of her mouth, and as he left, turned and said to witness, "if you ever tell this or have me arrested I will kill you." The witness saw by the moonlight, which struck him as he went out, that the man was a large negro, about six feet high, wearing a dark looking coat and shirt, and white striped pants. As he walked off he took a pair of red looking gloves from his pocket, and the defendant had on the same gloves when Mr. Robinson, the policeman, brought him to Callie Thomas' house after arresting him. The witness lay awake until after daylight, and when she arose at about eight o'clock she found one Henry Stall in another room in the house occupied by a woman named Mattie Keith. She told Stall of what happened the night before, and was advised by him to say nothing about it until the return of Jennie Ford and Mattie Keith, who had gone to Mexia. She adopted this advice, and on telling the two women was advised by Jennie Ford to seek the arrest of the negro, and by Mattie Keith to say nothing about it.

The cross-examination was but a more detailed narrative, and in no way affected that in chief. The witness positively identified the appellant as the man who raped her; and testified that he had forced carnal intercourse with her one time, effecting penetration. She denied that she had ever received money from the defendant, or that she had ever asked him for money, or invited him to visit her at the house and spend the night with her.

Jennie Ford, proprietress of the house at which the last witness resided, testified for the State, that on the Friday preceding the alleged assault, herself and Mattie Keith went to Mexia and returned the following Monday. On her return Katy Templeton told her that on Saturday night a negro came into her room and committed a rape on her. The witness asked why she did not have him arrested. The witness was present at the house of Callie Thomas when the defendant was brought there under arrest. Katy Templeton was either there at the time or came soon after, and identified the appellant as the man who raped her. She spoke of his face, his gloves and white striped pants.

The entire evidence located three houses of prostitution in close proximity, one occupied by "Indian Mollie" and others,. another by Callie Thomas and others, and the third by Jennie Ford, Mattie Keith, and this prosecutrix. Gus Robinson, night policeman, testifying for the State said that on Monday or Tuesday, he and Jack Ricker were down in the neighborhood of Callie Thomas', when they met the defendant. He told them there that some ten or fifteen men were down at Indian Mollie's "raising hell." When the witness and Ricker got there they could hear but two voices, which they took to be those of a man and woman, and returned. That night at about one or two o'clock the witness was sent for by Callie Thomas, but did not go down until next morning, when she told him that during the night a negro man had dragged her out of the window and attempted to ravish her. She described the man, and from the description the witness suspected the defendant. As he was leaving, Katy Templeton hailed him and told him of her being ravished on the Saturday night before. This description also led the witness to suspect the defendant and he arrested him.

"Waco" Mollie, for the defense, testified that she occupied the house directly west of, and about 20 feet distant from that occupied by Katy Templeton. On the night of the alleged rape the witness was sick and awake nearly the whole night from two o'clock until day, but heard no disturbance or noise from the house in which the offense was alleged to have been committed. She saw Katy Templeton next morning, but heard nothing from her about the alleged rape. She saw no signs of violence about her face or mouth, and noticed nothing unusual about Katy. The latter complained of not being very well. The testimony of Anna Wheeler, who lived in the house east and about twenty feet from that of the prosecutrix, was in effect about the same as that of "Waco" Mollie.

Several witnesses testified to the good reputation of the defendant with reference to his relations with women. The women who testified in this case and occupied the houses described were shown to be prostitutes.

J. F. Stout, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. This appeal is from a judgment of conviction for rape, the punishment assessed being confinement in the State penitentiary for thirty-nine years.

The sufficiency of the indictment is questioned by a motion in arrest of judgment, the objection being that it is not signed by the foreman of the grand jury. It is no longer an open question in this State that the objection is not tenable, either as an exception to the form or to the substance of an indictment or information, that the one is not signed by the foreman or the other by the county attorney or the attorney representing the State. It is true that in prescribing the requisites of an indictment, art. 420, Code of Criminal Procedure, states in clause 9 that it shall be signed officially by the foreman of the grand jury; yet, when the Code provides the exceptions which may be taken to the form of an indictment or information, the want of the signature of the foreman of the grand jury, or, in case of an information, the want of the signature of the attorney representing the State, is specially excepted from the other grounds of objection which may be reached in this manner. Art. 529.

These two provisions of the Code of Procedure are found in the last revision of the Texas Codes. On examination it will be found, however, that the language employed in the revised articles is identical with former provisions with regard to the present inquiry, and hence adjudications under the former statutes apply with equal force to the present provisions. By former decisions it has been uniformly held that the fact that the foreman of the grand jury had omitted to sign his name officially to an indictment was wholly immaterial so far as the accused is concerned, though the signature is commendable so far as the regularity of the the proceedings before the grand jury is concerned; and these decisions are in harmony with the evident meaning of the provisions of the Code cited above. See the cases collated in *Campbell* v. *State*, 8 Texas Ct. App. 84. But, further, the objection here raised to the indictment is one not of substance but one of form merely, and hence not available by motion in arrest of judgment. *Jenks* v. *State*, 5 Texas Ct. App. 68. The particular objection urged against the indictment in this case, however, is not available to the defendant, as an exception either to the form or the substance of the indictment. The court below did not err in overruling the defendant's motion in arrest of judgment.

On the trial a bill of exceptions consisting of two separate, independent paragraphs was reserved to rulings of the court on the evidence. The first paragraph of the bill recites that testimony which to our minds was wholly irrelevant was permitted to go to the jury over objections of the defendant's counsel, which testimony, if stripped of the attendant circumstances, would have been erroneously admitted and would doubtless have been excluded by the judge presiding. It is, however, shown by a statement of the judge, appended to this paragraph of the bill of exceptions, that the door to the admission of the questionable evidence was opened by the defendant on the cross-examination by the defendant's counsel of the prosecuting witness, the party upon whom the offense is alleged to have been committed, eliciting evidence similar in character to that complained of. In this ruling we find no error.

In the second part of the bill of exceptions it is recited that the defendant offered proof of his general character, by witnesses who had known him for ten years and knew his general character; which the court refused to permit, on objection of the prosecuting attorney. In this ruling we are of opinion the court erred. *Coffee* v. *State*, 1 Texas Ct. App. 584. The defendant was entitled to place the weight of his character into his end of the scale,—the inquiry being directed to the probability that he would commit the crime charged against him,—for what it was worth in the estimation of the jury, in connection with the other facts in evidence. The State would not ordinarily be permitted to introduce proof of the general bad character of a defendant on trial. The defendant may introduce evidence of general good character, and having done so the State would then be entitled to disprove the evidence of good character by the means at hand in rebuttal.

To render evidence of the good character of the defendant available to him the examination should embrace the idea whether one of good character would likely commit the particular offense for which he was being tried, or as Mr. Greenleaf expresses it: "The evidence, when admissible, ought to be restricted to the trait of character which is in issue; or, as it is elsewhere expressed, ought to have some analogy and reference to the nature of the charge, it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty, or on a trial for treason to inquire into his character for honesty in his private dealings." 3 Greenl. Ev. § 25. It must be borne in mind, however, that it is not in all public prosecutions for breach of law that evidence of a party's general character is admissible. The rule seems to be that whenever, in a criminal prosecution, guilty knowledge or criminal intention is of the essence of the offense, evidence of the general character of the party is relevant to the issue and therefore admissible; but when a penalty is claimed for the mere act, irrespective of the intention, it is not. 3 Greenl. Ev. § 26. It will be observed that Mr. Greenleaf deduces the rule from Chief Baron Eyre, quoted as having said that in a direct prosecution for a crime such evidence is admissible, but when the prosecution is not directly for the crime, but for the penalty, it is not. See authorities cited in note 1 to the section last quoted. In our opinion a defendant, when charged with and on trial for crime, is at liberty to put his general character in evidence if he so desire, with the limitations above stated, and subject to the right of the State to rebut the proof so offered. *Lockhart* v. *State*, 3 Texas Ct. App. 567.

The third paragraph of the charge is as follows: "If you believe from the evidence that the said Katy Templeton was unwilling to have sexual intercourse of a carnal nature with the defendant Sandy Jones, but that she acquiesced and did permit defendant to have carnal knowledge of her person under fear of death or serious bodily injury, induced by threats made against her or to her by the defendant, then you are instructed that in law such carnal knowledge of her person was without her consent, and the defendant in such case would be guilty of rape." The charge in the indictment is that the defendant, after making the assault, "her, the said Katy Templeton, then and there by force and by threats, and against her will, feloniously did," etc.

By force and by threats, the indictment charges. The testimony of the injured female is to the effect that both force and threats were employed by the defendant in the accomplishment of his purpose. The charge should have informed the jury with reference to the feature of force employed, as laid down in the statute (Penal Code, art. 529), to wit: that it must be "such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." And on the subject of threats the jury should have been instructed that the threats used in order to effect the purpose of the defendant "must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case." Penal Code, art. 530. These additions to the charge seem to be indicated by the Code in order that the jury might be enabled to understand what is meant by the terms *force* and *threats*, as a part of the law of the case, and should have been given, whether asked or not, especially in so grave a felony as the present. *Jenkins* v. *State*, 1 Texas Ct. App. 346.

Other errors are assigned, but which it is not deemed important to consider at present, for the reason that they are deemed unimportant or susceptible of easy correction on another trial. For error in the rulings on the evidence, and because of the omission in the charge as above set out, the judgment must be reversed and the case remanded for a new trial.

Reversed and remanded.

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JAMES CAMPBELL *v.* THE STATE.

1. EVIDENCE.— Even though the question propounded to a witness does not directly call for his opinion, if it appears therefrom that whatever answer might be elicited could embody nothing but a mere expression of opinion, the question should be excluded. See the opinion for an example.
2. SAME.—The general rule is that it is for the witness to state the facts, and for the jury to draw the conclusions. Among the exceptions to this general rule which excludes the mere opinion of non-professional witnesses, one is that on a question of sanity or insanity, a non-professional witness may give his opinion, based upon facts which have come under his own observation.
3. CHARGE OF THE COURT.—See the opinion for a charge of the court on circumstantial evidence held correct.
4. MURDER — MANSLAUGHTER.— A defendant on trial for an offense which admits of degrees, cannot be heard to complain that he was convicted of a lower grade of offense than the evidence would have warranted.

APPEAL from the District Court of Parker. Tried below before the Hon. A. J. HOOD.

This is the second appeal from a conviction of manslaughter under an indictment charging the appellant with the murder of John Booth in Parker county, Texas, on September 28, 1879. The former report, to be found on page 84 of the 8th volume of these Reports, sets out a full statement of the evidence upon which the conviction in the first instance was had. The conviction in this was founded upon the same evidence, except that for the admission of which the former conviction was reversed by this court. The punishment assessed was two years' confinement in the penitentiary.

Lanham, Roach & Stephenson filed an able brief for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WINKLER, J. This is a second appeal from a judgment of conviction for manslaughter. In the former appeal the punishment assessed was confinement in the penitentiary three years, but that conviction was set aside and a new trial awarded the defendant. 8 Texas Ct. App. 84. The appellant was indicted for the murder of one John Booth, alleged to have been committed in Parker county, on September 28, 1879. On the former trial before alluded to, the defendant was convicted, as we have seen, of manslaughter, and thereby virtually acquitted of the crime of murder of both the first and of the second degrees; so that, on the second trial from which this appeal is prosecuted, the defendant was tried alone upon a grade of culpable homicide of which he had not been previously acquitted, viz.: manslaughter. The charge to the jury in the present case ignored entirely the charge of murder contained in the indictment, and submitted to the jury the single question of manslaughter; to which charge of manslaughter the defendant pleaded not guilty.

The numbers of the bills of exception seem to indicate that three were reserved on the trial below; but on an examination of the transcript of the record only two are found, which are denominated respectively Nos. 1 and 3. In bill No. 1 it is recited that a defendant's witness named

Francis, on being examined, testified among other things that his residence was about one and a quarter miles from where the dead body of the party alleged to be John Booth was found, in a northwesterly direction from the residence; that the country between where the body was found was prairie country, and having also stated that he did not hear the report of any gunshots on a certain Sunday, to wit, the last Sunday in September, 1879, stated in the bill of exceptions as the day of the killing, and that on that day, to his best remembrance, the wind was blowing from the south, counsel for the defendant then asked the witness this question: "If there had been three or four shots fired on that day (meaning the said Sunday) at or near the place where the dead body was found, would you have heard the reports?" To the question and the anticipated answer counsel for the State objected, on the ground that the witness could not give his opinion, and that it was for the jury and not for the witness to draw and settle conclusions. The court sustained the objection and refused to permit the witness to answer the question, and the defendant's counsel excepted. The question, it is true, did not ask for an opinion from the witness, but, whilst this is true, it is not perceived how the answer to the question could have embraced anything further than the opinion of the witness as to whether the reports of three or four shots from firearms could have been heard at that time and at the distance the witness was from the supposed place of firing, with the wind blowing from the direction from which, according to the witness' best recollection, it was blowing at the time, it not appearing that the matter had been tested by actual experiment, nor that the witness was in any sense an expert and entitled as such to testify as to his opinion. For aught that appears in the bill of exceptions, the jury was as competent as the witness to deduce the proper conclusions from the supposed state of facts, and it is said that even the opinions of scientific witnesses are not always admissible in evidence as to the conclusion or inference to be drawn from them. The general rule, to which there are exceptions, is that it is for the witnesses to state the facts and for the jury to draw the conclusions. *Cooper* v. *State*, 23 Texas, 331; Roscoe's Crim. Ev. 135. Among the exceptions to the general rule which excludes the mere opinion of non-professional witnesses one is that an unprofessional witness may give his opinion based upon facts which have come under his own observation, on a question of sanity or insanity. *McClackey* v. *State*, 5 Texas Ct. App. 320; *Webb* v. *State*, Id. 596. We are of opinion the court did not err in refusing to allow the witness to answer the question. See various examples collated in Wharton's Crim. Law, §§ 459–60.

The other bill of exceptions, marked No. 3, relates to the charge of the court, and to its refusal to give certain special instructions asked by the defendant's counsel, and having reference to the charges complained of in the defendant's motion for a new trial; but chiefly, the bill states, "because the law of manslaughter was not fully charged, and because the court charged in regard to mistake of fact and arrest by private persons." On the subject of manslaughter the charge is as follows: "Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law. The passion intended in the above definition of manslaughter is either of the emotions of the mind known as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection. By the word *homicide* is meant the destruction of the life of a human being by the act, agency, procurement or culpable omission of another."

The charge on the subject of mistake of fact and arrest of private persons is as follows: "No mistake of law excuses one committing an offense, but if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense. The mistake as to fact which will excuse, as meant above, must be such a mistake of fact that a person so acting under the mistake of fact would have been excusable had his conjectures as to the fact been correct, and it must also be such mistake of fact as does not arise from a want of proper care on the part of the person committing the offense."

The other charge complained of is as follows: "On the subject of arrest the law is this: any private person may lawfully without warrant arrest an offender when the offense is committed in his presence or within his view: provided the offense is one classed as a felony or an offense against the public peace. But no private person has in law the right to arrest or attempt to arrest any man on his own motion under any other circumstances than those above stated, and whenever, if at all, such unlawful arrest as above indicated is attempted, and a conflict thereby is brought about and ensues between the parties, resulting in the death of the party sought to be arrested, the party attempting to make such unlawful arrest cannot in law either justify or excuse the killing on the ground that he was merely at the outset intending and attempting to make an arrest."

We are unable to say from the evidence that there was no ground for these several charges, nor can we say that these several charges enunciate any erroneous principle of law, and we fail to see that the matters to which they relate were of any vital importance one way or the other to such an extent as that an unimportant error in them could work such an injury to the substantial rights of the defendant as to require a reversal of the judgment.

To our minds the vital questions in the case are the proofs on the subject of the identity of the body found with that of the deceased, and the charge of the court by which the jury were to determine this controlling feature in the case, and incidentally whether the proofs adduced were sufficient to establish the identity of the defendant and so to connect him with the homicide as to bring him within the rules of law which would render him guilty of the grade of homicide for which he was tried and convicted, and whether the charge on manslaughter was sufficient to guide the jury aright in determining upon a verdict.

The case was one wherein the guilt of the defendant and the circumstances of the homicide, together with the identity of both the deceased and the defendant, was almost if not wholly dependent upon that character of evidence usually denominated circumstantial. On this branch of the subject the charge of the court, whilst perhaps not so full as that asked by the defendant's counsel, is believed to be amply sufficient to inform the jury what the law requires as to the certainty to which this character of testimony must tend before a jury would be warranted in convicting upon it. The charge is as follows: "In all such cases when the State relies on circumstantial evidence to convict the defendant, the law is that each fact in the chain of facts from which the main fact in issue is to be inferred must be proved by competent evidence beyond a reasonable doubt, and the facts thus proven constituting such chain of facts must be consistent one with another and also fully consistent with the main fact to be established; and the testimony, taken as a whole, when duly weighed and considered, must exclude beyond a reasonable doubt every other hypothesis but the one, viz.: the actual guilt of the defendant." This charge is in substance the charge given to the jury on circumstantial evidence in the celebrated Webster case (*Com.* v. *Webster*, 5 Cush. 296), so often quoted by courts and elementary writers, and is certainly as favorable to the defendant as he could ask, if not more so than absolutely required.

Other portions of the charge given seem to have been very favorable to the defendant. It is conceded that at best some portions of the charge asked by the defendant's counsel, abstractly considered, stated the principle involved correctly, but it is not perceived that they are more explicit or couched in better or more appropriate language than the charges given by the court. If there is any variance between the proof and the finding of the jury, it will be found on a careful examination that the evidence tends rather to establish a higher grade of offense than manslaughter, rather than a lower grade. If this be true, and if by the administration of the law, one accused of crime should be convicted of a lower grade of the crime included within the offense charged in the indictment than the proof warrants, certainly the defendant has no just ground to complain that he has been convicted of a grade of offense lower than the testimony warranted, and one for which a milder punishment is prescribed by law. In this case, however, on account of the facts that on a former trial the defendant had been virtually acquitted of murder, he could not be put on trial for that grade of offense a second time, but this did not prohibit the State from calling upon him to answer for a lower grade of the offense, included within the crime charged in the indictment, and for which he had not been previously tried; and to hold that a conviction for the lower grade of offense could not be sustained on the ground that the proof did not reduce the offense to the lower grade would be to say that the State could not inflict any punishment for the offense whatever, no matter how plain the evidence of his guilt. Such an application of the law would be a monstrous mockery, not to be tolerated.

The appellant has had a fair trial under the law, and has been convicted on an abundance of legal testimony. The punishment imposed can hardly be said to be commensurate with the proofs of his guilt. Every substantial right guaranteed to him by the law seems to have been carefully guarded by the judge who presided at the trial. No such error has been committed as would warrant this court in disturbing the judgment, and it is affirmed.

Affirmed.

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JAMES O'CONNELL *alias* THOMAS WILLIAMS *v.* THE STATE.

1. EVIDENCE.—When a prisoner, having been examined as a witness in a prosecution against another person, has answered questions to which he might have demurred as tending to criminate himself, his answers are deemed voluntary, and as such may be subsequently used against him for all purposes.
2. SAME — EXAMINING TRIAL.—Testimony taken on an examining trial before a magistrate is required by the Code to be reduced to writing, signed by the witness and certified by the officer. And where this is required the law presumes that the magistrate performed his duty; and if he did, parol evidence of what the witness said cannot be received.
3. SAME.—But if it be shown that the evidence was not reduced to writing, or if the written examination, by reason of irregularity, is wholly inadmissible, parol evidence of what was disclosed is admissible. If uncertain whether or not it was reduced to writing, the presumption that the officer discharged his whole duty obtains, and parol evidence will be rejected.
4. CONFESSIONS.—No statement made by a party while in jail or legal custody is competent evidence against him, even as a mere link in a chain of evidence, unless it was voluntarily made before an examining court, or was voluntarily made after caution that it might be used against him, or unless, in connection therewith, he made statement of facts and circumstances found to be true, and which tend to establish his guilt. And it is immaterial that the offense for which he is in custody when he made the statement was a different offense than that on the trial for which it is offered in evidence.
5. SAME. — Only such parts of the voluntary confession of an uncautioned prisoner as relate to verified disclosures are admissible against him. Other facts, though part of the same confession, are not. See the opinion for an application of these rules to this case.

APPEAL from the District Court of Navarro. Tried below before the Hon. L. D. BRADLEY.

The indictment charged the appellant with the theft, on the 10th day of December, 1879, of a gelding, the property of John Smith. His trial, in February, 1881, resulted in a verdict of guilty, with five years in the penitentiary assessed against him as punishment.

So much of the evidence as is essential to an understanding of the case, and upon which the judgment is reversed, is quoted from the testimony of the prosecuting witness, John Smith:

"I was present at an examining trial of Charles Hide before a magistrate in Houston county, for the theft of my horse. The defendant was placed on the stand, and was, I think, in custody at the time as an attached witness in that case. I heard the justice read parts of a written instrument, purporting to be an affidavit made by the defendant some time in the month of February, 1880. I heard the justice ask the defendant if he, the defendant, did not state to the said justice that he, the defendant, and the said Hide then on trial, went together along the road near Maj. Smith's (witness') stable at night, and that said Hide went into the said stable and took the witness' horse, and that he, the defendant, by the direction of the said Hide, turned loose the horse which he, the defendant, was riding, and which belonged to a negro living about four or five miles from witness' house, and that the said Hide then put him, the defendant, on witness' horse and sent him to Corsicana on business? The defendant admitted that he had made such statements, but denied that they were true."

Simkins & Simkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. As a rule of evidence it is settled that "where the prisoner, having been examined as a witness in a prosecution against another person, answered questions to which he might have demurred as tending to criminate himself, and which therefore he was not bound to answer, his answers are deemed voluntary, and as such may be subsequently used against himself for all purposes." 1 Greenl. Ev. (Redfield's ed.) sec. 225; *Alston* v. *State*, 41 Texas, 39.

Our statute requires, however, that on an examining trial had before a magistrate the testimony shall be reduced to writing, and be signed by the witness and certified by the officer taking the same. Code Crim. Proc. art. 267. Where this is required the law conclusively presumes that the magistrate performed all his duty, and in such case no parol evidence of what the witness said on that occasion can be received. But if it is shown that the examination was not reduced to writing, or, if the written examination is wholly inadmissible by reason of irregularity, parol evidence is permissible to prove what was disclosed. If it remains uncertain whether it was reduced to writing or not by the magistrate, it will be presumed that he did his duty, and oral evidence will be rejected. 1 Greenl. Ev. sec. 227; Whart. Crim. Evid. (8th ed.) sec. 667; *Guy* v. *State*, 9 Texas Ct. App. 161; *Dunlap* v. *State*, 9 Texas Ct. App. 179.

Under these rules the objection made by defendant to the testimony of the witness Smith as to statements made by defendant on the examining trial of Hide, and which were reduced to writing, should have been sustained; the written testimony taken by the magistrate being the best if not the only admissible evidence.

But it is said that the written testimony would have been itself inadmissible because at the time defendant was a witness in the case of Hide, and made the statements criminating himself, he defendant, was under arrest. It is not very clear from the record whether at the time the statements were made defendant was under arrest for the offense now charged against him, and with which

Hide also was charged, or for another and different crime. In either event, the rule seems now established that, "No statement made by a party while in jail or legal custody is competent evidence against him, even as a mere link in a chain of evidence, unless it was voluntarily made before an examining court, or was voluntarily made after caution that it might be used against him, or unless in connection therewith he made statements of facts and circumstances found to be true, and which tend to establish his guilt. And it is immaterial that the offense for which he was in custody when he made the statement was a different offense than that on the trial for which it is offered in evidence. *Taylor* v. *State*, 3 Texas Ct. App. 387; *Parchman* v. *State*, 2 Texas Ct. App. 229; Code Crim. Proc. art. 750.

The objection to the written testimony, and in fact to the whole admissions or confession of defendant, is further met by the state with the claim that, though made whilst defendant was under arrest, still they are admissible because in connection therewith he made a statement of facts and circumstances found to be true which tended to establish his guilt. It will be found, however, that the rule thus invoked will not admit the entire confession, but is limited solely and strictly to the facts and circumstances found to be true. To go beyond and admit the entire confession would be contrary to the settled construction of our statutes regulating confessions. *Davis* v. *State*, 8 Texas Ct. App. 510; *Walker* v. *State*, 9 Texas Ct. App. 38, and authorities cited.

It follows from the foregoing that, if the testimony of the accused given on another trial was voluntary and given when he was not under arrest, it would be *prima facie* competent evidence against him. But if the evidence was taken before an examining court that then the written testimony was alone admissible. If the party was under arrest and duly cautioned, then the written evidence would also be admissible; but if he was not cautioned his inculpatory disclosures voluntarily made would be admissible against him if the disclosures were found to be true, while at the same time this would not let in other statements or declarations, if any such there were, not directly connected with or explaining the information he gave. We throw out these suggestions with a view to another trial and because we are not sufficiently apprised as to the nature, character and extent of the confessions as they will or may be disclosed by the written testimony, so as to determine how far under the above rules they would be competent.

Because the court erred in permitting parol evidence of the testimony as taken and written down on the examining trial, the judgment is reversed and the cause remanded.

Reversed and remanded.

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JIM JOHNSON *v.* THE STATE.

1. PRACTICE — THE "RULE." — To the trial court is confided the discretion of enforcing the "rule" against witnesses, and its action will not be revised by this court in the absence of a showing of abuse.
2. SAME. — Ordinarily expert witnesses, and witnesses who are attorneys in the case, and those called to testify to a witness' reputation for truth and veracity, are exempt from the "rule."
3. SAME. — When medical experts are called solely as such the better practice is to exempt them from the "rule," in order that they may hear the whole evidence touching the matter respecting which they are called to testify; but where this is not done an hypothetical case embracing the facts in evidence may be submitted for their opinion.
4. SAME. — But where, as in this case, medical witnesses were not called as experts, but merely as witnesses to give their evidence of the mental capacity of the defendant derived from a personal acquaintance with him, their subjection to the operation of the rule was not error.
5. EVIDENCE — INSANITY. — To support a plea of insanity, the evidence must be such as to satisfy the minds and consciences of the jury to

the extent that they can say he should be, and is, acquitted upon that ground. Should it fail to so satisfy them, their finding is conclusive and will in no case be reversed unless the finding is most clearly and directly against the evidence. (HURT, J., dissenting.)

APPEAL from the District Court of Johnson. Tried below before the Hon. J. ABBOTT.

The defendant was charged by bill of indictment with an assault with intent to murder J. H. Daniels, in Johnson county, Texas, on the 7th day of December, 1880. His trial resulted in conviction, with punishment assessed at two years in the penitentiary.

The substance of the testimony of J. H. Daniels, the first witness for the State, was, that at the time of the shooting he lived with his brother, Angus Daniels, about two miles south of the town of Grand View, Johnson county, and was engaged with him in farming. There was a house in the field, about 300 yards from the main residence, stored with 700 or 800 pounds of seed cotton, and some beds in which the witness and three of his nephews slept at night. On the night of the 8th of December, 1880, at about 8 o'clock, the witness left his brother's house, alone, going to the house in the field to go to bed. He passed around a pile of cotton, as he entered the door, and when he had made one step into the first room he was fired upon by some one, the shot taking effect in the right shoulder. The shot was fired from a shot-gun at close range. The witness immediately clutched the gun, and after some struggling wrested it from his assailant. The latter escaped, saying nothing, but making a noise that sounded something like "bow-wow-wow." The witness followed him ten or twelve steps, attempting to get a shot, but the man escaped in the darkness. Presently the witness' brother Angus arrived, and witness gave him the gun,—a double-barreled shot-gun,—and showed him the direction in which the man ran. The witness also described the topography of the vicinity, which is immaterial in explanation of the leading features of the testimony. The witness had never known nor heard of the defendant, nor seen him to his recollection.

A. P. Daniels testified, for the State, that when his brother J. H. Daniels left his house going to the field-house to bed, on the night of the shooting, he went out to his horse-lot, and while there heard the report of a gun from the direction of the field-house, and immediately went there, and found J. H. Daniels standing some dozen steps from the door, with a gun in his hand. He told witness that he was shot, and the direction taken by the man who did the shooting. In the house he found a coarse black hat, of medium size, rather low-crowned and narrow-brimmed, and considerably worn. He went in the direction indicated by his brother, as far as a neighborhood gin, and inquired for the man but could hear nothing of him. He delivered the gun to Esquire Boyd the next day, and had since seen it in the hands of N. H. Cook. Had never seen the defendant before the shooting that he knew of.

W. J. Brigance was next introduced by the State. The substance of his testimony was that he lived in the same enclosure, and some 500 or 600 yards from the house in which J. H. Daniels was said to have been shot. Going out of his house on the morning after the shooting, just after breakfast, at about an hour by sun, he saw a man standing in the path which led from a lot up to his house, about forty feet from the house. He had never seen the man before, but recognized him on the trial as the defendant. He was bare-headed, seemed much excited, but was not, so far as witness could see, wounded. He asked the witness if he could give him a hat, saying that he had lost his during the night. The witness went into the house, brought out a hat and gave it to him. He then asked the witness the way to Grand View, and getting directions, left. The witness saw him again about ten o'clock on that same day in Grand View. He was then wounded and under arrest.

Mrs. Mary E. Deckard testified, for the State, substantially that she had known the defendant for about three years. In December, 1880, he was living on the Robertson place, about three miles south from Cleburne, in Johnson county. It is gathered from the testimony of this witness that herself and children also occupied the house in which defendant lived. He owned a wagon, a gray and a brown horse, a shot-gun and some other property. The witness employed him to take herself and children to her son's in Dallas county, and they started in the wagon drawn by the horses described, on the evening of December 6th, 1880. Besides some bed-clothing the defendant took along a double-barreled shot-gun, locking up his house, to which he was shortly to return. They made about ten miles the first evening and camped. The next being a severely cold day, they traveled but about five miles and went into camp near Mr. Hamilton's place, about 200 yards from Smith's gin. (This gin is about three miles from the house in which the shooting was done.) Mr. Hamilton came to the camp after supper that night, and engaged the defendant in conversation for a short time. The witness and her daughter retired that night between 8 and 9 o'clock; the defendant a little later. About 11 o'clock the witness waked up and saw the defendant sitting up on the foot of his bed. She asked him if he was not cold, and he replied "not very," but that he was warming his feet. The witness went to sleep again and did not wake up until about daybreak, when she called to defendant, telling him that some horses were eating his corn. The defendant did not answer, and she discovered that he was gone; also that two of the quilts of which he had made his bed, his gray horse, one bridle and his shot-gun were gone. She waited until about 10 o'clock about the camp, and then employed Mr. Hamilton to take herself, daughter, wagon and the remaining horse back to Cleburne.

From about 11 o'clock on the night of the 8th of December, when she saw the defendant sitting up on his bed, until the next evening, that of the 9th, she saw nothing of the defendant. On that evening she saw him in a drug store in Cleburne. She did not know what caused him to leave camp on the night of the 8th. On that night when he was sitting by the fire he told the witness that he felt like he was going to be mobbed. The witness assured him that he was in no danger from anyone, and asked him to be quiet. He spoke of being mobbed several times. The witness had often known the defendant to act very strangely. He would frequently get up from his bed at night, apparently asleep, and leave the house. Several times he got outside the yard gate, and the witness' son, who slept in the same room with him, followed and brought him back. At such times he would not heed calling, but when touched would rouse up and return. On one occasion during the past fall — that of 1880 — he got up and awakened the household by chopping with a hatchet on the end of the house. He wore a common coarse black hat, with rather low crown and narrow brim. The witness had never known him to use intoxicating liquors.

L. J. King was introduced for the State, and testified that a gun which had that morning been shown him by A. P. Daniels was the same gun he had seen in the possession of the defendant during the preceding summer. This witness stated that the defendant moved away from the Robertson place where he had been living for three years, about the last of November or first of December, 1880, taking all his effects, or at least leaving nothing in his house. This witness regarded the defendant as a man of good sense, and thought he had sense enough to take care of his own business and make a good farm hand, and enough to know it was wrong to shoot a man.

Z. Hamilton, placed on the stand by the defense, corroborated Mrs. Deckard as to the party camping near his house, his visit to the camp at night and his employment next day to take Mrs. Deckard, child, wagon, and the brown horse to Cleburne. He testified to some rambling conversation he had with the defendant, in which the latter contradicted himself somewhat in his statements to the witness. He could not positively identify the man in the camp and the defendant as one and the same, and expressed no opinion on this point.

The remainder of the testimony of the defense was directed to prove the defendant's imbecility, or his incapacity to distinguish right from wrong. Dr. Young, who had known and treated him, did not consider him insane or an idiot, but imbecile, incapable, when laboring under some strong mental emotion, of distinguishing right from wrong, but when in mental repose possessed of sufficient reason to know the wrong of shooting a man. Dr. Keating, on the contrary, pronounced the defendant insane, and not, in his opinion, a reasonable creature. He had been the regular physician of the defendant for some years, and related some of the symptoms upon which he based his opinion.

Other non-professional witnesses were introduced, among whom was N. H. Cook, who had often had business transactions with defendant. He thought the prisoner capable of discerning right from wrong when not laboring under violent mental emotion, but, when so afflicted, entirely destitute of such reason.

D. T. Bledsoe, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. It has been repeatedly decided with regard to matters of practice in placing witnesses under the rule at the request of either party, as is provided by art. 662, Code Crim. Proc., that they are confided mainly to the discretion of the trial judge, and are not revisable in the absence of a showing of abuse. Clark's Crim. Laws of Texas, p. 511, note 199; *Estep* v. *State*, 9 Texas Ct. App. 366. Ordinarily witnesses who are summoned as experts, as well as attorneys in the case and witnesses called to testify to the character for truth and veracity of a witness, are excepted from the rule and permitted to remain in the court room while the rest are sent away. *Brown* v. *State*, 3 Texas Ct. App. 295. When medical experts are called solely as such, the better and most satisfactory practice would be to allow them to remain in the room and hear the testimony of all the other witnesses, in order that from the whole testimony they may be able to determine from the evidence itself the matter upon which their opinion is desired. Still, where this has not been done, a hypothetical case embracing the facts in evidence may in all cases be submitted to them for their opinion. *Webb* v. *State*, 9 Texas Ct. App. 490; *Hunt* v. *State*, 9 Texas Ct. App. 166.

In the case before us the medical witnesses Drs. Keating and Young appear, from their testimony as exhibited in the statement of facts, to have been called, not as experts to declare a scientific opinion based upon the other testimony in the case, but simply as witnesses to give their own evidence of the condition of defendant's mental capacity as derived from a personal acquaintance with him. Such being the attitude they occupied with relation to the case, it is not manifest that the court abused its discretion in the slightest by subjecting them to the operation of the rule.

The defense relied on was not so much insanity as mental imbecility, or incapacity to distinguish right from wrong. Upon this point the testimony is conflicting. Dr. Keating is the only witness who believes that the defendant is not a reasonable creature, but insane; the other witnesses believe him capable of distinguishing right from wrong, and accountable for his acts when not under the influence of some powerful emotion of mind. The witness King, who knew him well and lived in his immediate neighborhood, said he was a man of good sense,—had sense enough to attend to his own business and make a good farm-hand, and that he had never seen anything wrong with him.

The charge of the court upon this branch of the case presented the law in explicit and ample terms, as now understood in this State, and the jury were fully apprised of their duty in the premises. The evidence under such proper instructions as to the law has failed to satisfy them that defendant's mental incapacity was such as to render him irresponsible for his acts. To support a plea of insanity the evidence must be such as to satisfy the minds and consciences of the jury to the extent that they can say he should be and is acquitted upon that ground. *Webb* v. *State*, 9 Texas Ct. App. 490; *King* v. *State*, 9 Texas Ct. App. 557. Should it fail so to satisfy them, their finding is conclusive and will in no case be reversed, unless the finding is most clearly and directly against the evidence.

We have been unable to see any such error in the record as would call for a reversal of the judgment, and it is therefore affirmed.

Affirmed.

HURT, J., does not concur in this opinion.

Syllabus.

JACK POST v. THE STATE.

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1. **Practice — Jury Law.** — A proffered juror, stating on his *voir dire* that he had formed an opinion, and that evidence would be required to remove it, was further tested by the court, and stated that he had never heard witnesses, nor any one who pretended to know the facts, detail them; that the opinion formed was not definite and fixed; that he had no present conviction, and could render a verdict entirely free from any previous opinion. *Held*, that, the examination of the proposed juror stopping here, the trial court did not err in holding him a competent juror.
2. **Same — Evidence.** — As a predicate for the introduction of the written testimony of one A. before an examining court, a witness stated the contents of a letter received from A., showing his permanent removal beyond the jurisdiction of this State. The defendant complains that the letter itself was the proper evidence of its contents, but the judge's explanation to the bill of exceptions shows that the objection to the proof was not made when offered. *Held*, that, to be available, the objection should have been interposed when the proof was first offered.
3. **Same.** — The residence beyond the jurisdiction of this State of a witness may be proved as other facts in the case, and no formal, independent oath to that effect is necessary in order to lay a predicate for the introduction of his written testimony.
4. **Same — Depositions before Examining Courts.** — When a deposition is taken before an examining court or a jury of inquest, and is reduced to writing and certified according to law, the defendant being present and the privilege of cross-examination afforded him, and it is shown that since the deposition was taken the witness has died or removed beyond the limits of the State, or has been prevented from attending court by reason of age or bodily infirmity, or through the act or agency of the defendant, or by the act or agency of any person whose purpose it was to deprive the defendant of the benefit of the testimony, the deposition is admissible. See the opinion *in extenso* on the subject.
5. **Evidence.** — That the defendant told the witness that he got certain property of the deceased was a fact clearly admissible in evidence, it being in proof that prior to the murder the defendant owned no property of the character described, and that immediately after the murder he was found in possession not only of that but of other property of the deceased. It is no objection that this evidence was elicited upon cross-examination of a witness for the defense.
6. **Same.** — The erroneous admission of evidence which is neither parti-

nent nor material to an issue in the case, and which could have no tendency whatever to affect or prejudice the rights of the defendant, is not cause for reversal.

7. CIRCUMSTANTIAL EVIDENCE — CHARGE OF THE COURT.— See the opinion *in extenso* for a charge upon circumstantial evidence *held* to be a charge upon the weight of evidence, but which, being neither excepted to by the defendant nor operating to his prejudice, constitutes no cause for reversal.
8. CHARGE OF THE COURT — WEIGHT OF EVIDENCE.— A charge upon the weight of evidence is not necessarily ground for reversal, unless it appears by bill of exceptions that it was objected to at the time, so as to enable the court to correct or withdraw it from the jury. If exception is not taken, such charge may, nevertheless, be made ground in a motion for new trial, refusal of which, if it appears that the charge was flagrant error to the material injury of the defendant, will be cause for reversal.
9. PRACTICE.— No objection having been taken at the time to the action of the court in the appointment of a foreman of the petit jury, and no prejudice appearing to have resulted therefrom, this court will not entertain this objection.

APPEAL from the District Court of Young. Tried below before the Hon. T. L. HUTCHISON.

The indictment, presented on the 21st day of January, 1880, charged the appellant, and his brother Nelson Post, with the murder of G. B. McDermott, in Young county, Texas, on the 15th day of October, 1879. The trial of the appellant, a severance having been granted, resulted in his conviction of murder in the first degree, with the death penalty assessed. The evidence discloses a crime of unusual atrocity, instigated evidently by desire of the perpetrators to possess themselves of a few paltry articles of property belonging to the deceased. The evidence is almost purely circumstantial, but of such strength and character as to convince the jury that the appellant and his brother, and no others, were the guilty agents.

J. W. James testified, for the State, that he was one of a party who searched for the body of G. B. McDermott, supposed to have been murdered in November, 1879. The skeleton of a man was found by the party, during that month, in a wash-out on the south side of Fish creek, in Young county, Texas, about 300 yards south of McDermott's house, and covered with brush and earth. The skull had been fractured on the temple in front and on the back. It was exhibited on the examination trial. Three tracks were found on the side of the bank of the creek; they were not as fresh as those made by the searching party. The party found gray and black hair where they found the skeleton. The witness did not see the shirt exhibited on this trial, on the body of the skeleton. Blood was found in the southeast corner of the house of deceased. On his cross-examination, the witness stated that the tracks in the bank were below the crossing. He found no blood at the fence, nor in the field between there and the house. The body or skeleton was found 25 feet from the water hole in the creek, the north bank of which was steep and some seven or eight feet high. The witness saw McDermott last on Sunday, October 12, 1879, in company with this appellant, going towards McDermott's house, both riding McDermott's horses, and the latter carrying appellant's gun.

E. P. Thorp, for the State, testified that he had known the appellant one year. The appellant told the witness that he had bought McDermott's wagon and horses for $125. He further told the witness that a man came to McDermott whilst in the field, who McDermott said was his brother, and who stayed an hour and left; and that about an hour by sun two men came to McDermott's, with whom the latter, after winding up his business in an hour, left. The appellant further stated to the witness that he was returning from Graham and met McDermott at Old Brazos about one hour in the night, and that he, McDermott, asked him for the key to get a valuable paper from the house, and that this was the last time he saw McDermott. Appellant had the team and the household and kitchen furniture of the deceased, and said that he had purchased all from him for $125, borrowing the money from Tom Trout, and that Trout and Nelson Post had witnessed the trade. He did not remember what day appellant said he met McDermott the last time.

The witness was present when the body was found by J. B. James 300 yards south of the house and near the water hole in Fish creek. From the appellant's to McDermott's the distance is about six miles. The witness went to the appellant with Wade Anderson and asked him for Mrs. McDermott's things. He said that he had bought and paid for them, but that if Mrs. McDermott would leave the country, and relinquish to him the rent of the place, he would give them to her. The witness, Anderson, appellant and appellant's wife were present at this interview. The witness went to McDermott's house with Mrs. McDermott, on the third Sunday in November, 1879, and swept out. He searched, and found what he took to be blood. Witness recognized a black and snuff-colored overshirt found on the skeleton as one worn by McDermott for two years, but could not recognize the skeleton itself.

Wade Anderson testified to the facts as stated by the last witness, and, in addition, that the appellant said that McDermott had considerable money in addition to what he had given him. He did not testify to the shirt.

Tom Trout testified, for the State, that he was a nephew of the appellant. He did not witness a trade between the appellant and McDermott nor did he lend the appellant any money. The witness last saw McDermott at Nelson Post's house, on Sunday, October 12, 1879, about 11 o'clock. Appellant and Nelson Post went out to lariat a mule, and were gone about half an hour. After dinner they went out of doors, some 25 steps, and engaged in conversation. At 3 o'clock, appellant and McDermott left, going north, and carrying appellant's gun, a British rifle.

The witness described the gun, and said that it was in good condition on that day, October 12, 1879. About one week later the witness found the gun-stock broken, and was told by the appellant that the wagon had run over it. It bore no marks of a wagon wheel. On the Wednesday following Sunday the 12th of October, 1879, the witness for the first time saw the appellant in the possession of McDermott's things. He said that he had bought them, and offered the witness ten dollars to take the things, wagon and horses off and sell them. The appellant was poor, and had but one mule, and it was held by Slack for the purchase money. A pair of oxen previously purchased by the Posts were taken back by Doc Deaton for non-payment of the purchase money. Appellant raised no corn or cotton in 1879. A short time before his arrest on October 19th, the appellant, in the presence of witness, his (appellant's) wife, mother, and Nelson Post, said that he had to raise $50 for McDermott. The occasion of this remark was the request of Nelson Post to appellant for a dollar which the appellant had. The witness left Nelson Post's house with Doc Deaton at 3 o'clock on October 12, 1879. The witness was at Nelson Post's on the evening that the appellant was arrested. He and Nelson Post went to the appellant's house, and there Nelson Post was arrested. The appellant went into the house to change his clothes, and when witness went in the room where he was, the former put a book in witness' pocket, which the latter found to be a diary and burned it.

James Melton testified, for the State, that on the 4th or 5th of November, 1879, he went with Mr. Brim to the appellant's house to arrest him and Nelson Post, and found the appellant and his wife there. He asked the appellant about McDermott, and he said that all he knew was that he had left the country; that he, the appellant, had bought his horses, wagon and general "plunder," giving McDermott $125 therefor. He further detailed the statement made by appellant to other witnesses about a man, who McDermott said was his brother, coming to McDermott's field one evening, but to this witness the appellant said that the two men with whom McDermott went off came next day. Appellant told witness that he got Johnson to write a bill of sale, but that neither he nor McDermott could read it, but that he, appellant, had living witnesses to the trade, and asked what offense he committed in going into the house and taking the property. He also told witness that if Mrs. McDermott run at him with law, he would "penitentiary her." He remarked to the witness that McDermott had said he would "like to strike Sam Bass," and he, appellant, asked him, McDermott, if he would rob individuals, and the latter said "no, but railroads and corporations." He, the appellant, said that a search warrant was not necessary, as he would give up the things, and spoke of contract and compromise. The witness found a pistol at the house, which the appellant said he bought from McDermott. He reached the appellant's house in the evening, and had appellant in custody before Nelson Post came up. The conversation between the witness and the appellant occurred before the arrest. While there, the appellant appeared restless.

Dr. J. Q. Dunlap testified, for the State, that the bloody pillow-tick, slip and bed-clothes exhibited are the same he saw in possession of Beard, the constable. Witness was at McDermott's house the day before the body was found, with a search warrant, and there found an old pair of boots which he identified as a pair worn by McDermott the last time the witness saw him. Referring to the skeleton found, he said that the wounds on the head were made with a club or some such instrument. McDermott had a peculiar lock of hair on the left temple, grayer than the rest of his hair, oblong in shape, one and a half inches long and two inches wide. The skeleton had a similar patch of hair, same in color and on the same temple, but rounder and more irregular and one inch in diameter. The witness could not say that this was McDermott's hair. He has cut McDermott's hair. The lock exhibited on the examining trial was cut from the temple of the skeleton; it was dark and grayish, similar to the peculiar lock worn by McDermott, and is, in the opinion of the witness, the same. The dark, white-spotted shirt found on the skeleton looked very much like a shirt McDermott usually wore.

Mrs. McAbee testified, for the State, that McDermott at the time of his death was her husband. She saw him last in September, 1879, when she went to Parker county. He was to go for her in a week or two. Failing in this appointment, witness became uneasy and returned home by stage. She found notice to rent on her house, and her household and kitchen furniture at appellant's, which he claimed to have bought. The witness saw the shirt found with the body, and recognized it as McDermott's. She had often patched and sewed on it. Recognized the knife exhibited as McDermott's. A bloody mattrass, which the witness has at home, and the bloody pillow and case here exhibited, all of which she obtained from the possession of appellant, she identified as McDermott's.

C. W. Johnson testified that he wrote in blank the bill of sale exhibited for appellant, some time between the September term of the County Court and the time that McDermott was missed. He left blanks for the description of the property.

The bill of sale is set out in the record as follows:

"The State of Texas, County of ——.

"Know all men by these presents that I, Green McDermet, for and in consideration of the sum of $125 dollars to me in hand paid, the receipt whereof is hereby confessed, have bargained, sold and delivered, and by these presents do bargain, sell and deliver to J. J. Post, his heirs or assigns forever, all the following described personal property, to wit: One bay horse, 15½ hands high, 8 years old, brand J. O. on the rite sholder, one bay horse 14 hands and one inch high, 10 year old, brand M. D., the left shoulder, and a 3 inch steudabaker wagon. To Have and to Hold unto the said . . . . his heirs or assigns, the above described property; and I bind myself and heirs and legal representatives to warrant and forever defend the title to the same against the claim or claims of all persons whomsoever. In testimony whereof I have hereunto signed my name, this —— day of A. D. 187—."

J. W. Preston, for the State, testified that about the 19th day of September or October, 1879, and about ten days before the arrest of the appellant, on a Sunday afternoon, he saw appellant and Nelson Post in the woods, about 300 yards from Nelson Post's house, writing,— the appellant doing the writing and Nelson Post holding the ink. As the witness approached them they got up and started to leave, but seeing witness they advanced a few steps towards him. Witness remarked, "you are writing a letter?" Appellant said "yes." The paper they were using looked about the size of the paper exhibited (the bill of sale). It had some blank spaces in it, and appeared either to be in two pieces or one piece folded down at the top. They said the children annoyed them so at home they could not write there, and so they came into the woods. They moved off towards the house, but, as the witness started off, they returned, sat down, and went to writing again. The two McDermott horses were near them at the time.

For the State, Wm. Chandler testified that on Sunday evening, about the 10th or 12th of October, 1879, he saw appellant and McDermott together, riding McDermott's horses, and near McDermott's house. McDermott had a gun. He asked witness what he intended doing when water gave out where the witness lived, and asked him to come and stay at his house while he went to Parker county for his wife. He said he had to pick out a little cotton before he went to Parker county. On the following Sunday the witness went to McDermott's house; he found no one there, and the fence was down and cattle in the field. Evidently they had been in the field three or four days.

John James, Sr., testified that he took dinner with McDermott on the Saturday before he was missed. Appellant was also there. McDermott said that he was going to improve the place. On the next day, Sunday, he saw McDermott and the appellant going towards McDermott's house. One of them had a gun. The witness saw the shirt found with the skeleton on Fish creek, and it looked like the one McDermott wore on the Saturday witness dined with him. The knife shown witness he believed to be McDermott's, as he had seen him whittling with a knife that looked like it. Neither appellant nor Nelson Post had any property, and they raised neither corn nor cotton in 1879.

Hughes testified that the appellant told him on Saturday, October 11th, 1879, that he had sold some cotton and had traded for McDermott's horses, and offered to trade the least of these for one that belonged to the witness. The witness is not positive but thinks this was on the second Saturday in October, 1879; the appellant dined with him that day. It was after McDermott was missed, but before the body was found. Appellant raised no cotton that year.

J. H. Glasgow testified that he found the knife exhibited; it was found about ten or twelve feet below where the skeleton was found, on Fish creek, and in the same ditch.

J. W. Hardy, testifying for the State, said that he saw the appellant and Nelson Post at McDermott's house, loading and moving his property, on the Monday after the third Sunday in October, and after he had heard of the alleged trade.

Doc Deaton testified, for the State, that he was at Nelson Post's on Sunday, October 12, 1879. The Posts, Nelson Post's wife, old lady Post, Tom Trout, and a man they called McDermott or "Mc" were there. When the witness rode up, the appellant and Nelson Post were together, 25 steps east of the house, talking. After dinner appellant gave McDermott "The Life of Sam Bass" to read, and he and Nelson went out, sat down and went to talking; Tom Trout was standing near them. During the day, McDermott had refused to trade horses with Nelson Post, saying that his team suited him, and that he had paid $100 for one of his horses. Appellant said that if he owned the horse he would not take $100 for him. After dinner, appellant and McDermott left together, going north. The witness passed Nelson Post's on the Wednesday following. Appellant and Nelson Post were there, and in possession of McDermott's horses and of a wagon filled with cotton.

O. E. Finlay testified that he was present at the examining trial of this cause, as counsel for the appellant. Dr. Atkinson was examined on that trial. The appellant had opportunity to cross-examine him, and witness did cross-examine Atkinson. The witness could not be certain but was of impression that Dr. Atkinson was sworn. He does not know where Dr. Atkinson now lives. When he left the witness asked him if he expected to return, and he said that he did not know.

Chas. O. Joline testified that he was county clerk and wrote the testimony shown him, and the jurat thereto. The signature is in the handwriting of Dr. J. McC. Atkinson. He left Texas about June 1st, saying that he was going to Arkansas. The witness had received letters from him, written in his handwriting, signed by him, postmarked Pine Pluff, Ark., in which he wrote that he was residing in Pine Bluff, practicing his profession.

The deposition of Dr. Atkinson, taken before the examining court, was read by the State. It showed in substance that the doctor was called upon by Esquire Jones to make an examination of the carcass found on Fish creek. The bones were those of a human being. No traces of gun-shot wounds could be found, but the head was badly bruised and beaten up. The frontal bone was broken through. The temporal and occipital bones were likewise broken through. The wound in front of the skull seemed to have been inflicted with the pole of an axe. Other bones found were intact, except that the end of one of the fore-arms seemed to have been eaten off by hogs, and a piece was broken off of a thigh bone, which, being soft, could have been broken by hogs. The witness was well acquainted with McDermott, and stated that the hair and whiskers found on the carcass corresponded with those of McDermott. A shirt was on the carcass, and a number of ducking rags were lying around. From appearances the bones were those of a man who had been dead some three or four weeks.

Cross-examined, the witness said that the skeleton may have been of a man dead less than three or four weeks, but he did not think the flesh would have dropped off in less than two weeks. The hole in front of the head was about the length of the pole of an axe, and could not have been cut much smoother with a saw. It appeared to have been made by a heavy blow, an inch and a half above the left eye, breaking the upper edge of the nose and the upper and lower cheek. The lower cheek might have been broken some other way. The other three places were cracks, running in different directions; they did not diverge from the front wound and could not have been made by the same blow.

Tom Trout, recalled by the State, testified that appellant asked him if he would swear that he saw Nelson Post pay McDermott $125. The witness saw no such transaction.

The defense introduced John James, Jr., as first witness. He testified that he was at a hole of water with Doc Deaton and old man Deaton, when appellant and McDermott rode by, from a northern direction. Doc Deaton asked appellant to "come by, and tell us some lies;" to which he responded that he had no time. Deaton told appellant that he would like to exchange horses with him, and appellant, in McDermott's presence and near enough and loud enough to be heard, replied that he would trade either. McDermott said nothing.

Doc Deaton, for the defense, corroborated this last witness in regard to the proposition to trade horses in the presence of McDermott. The latter said nothing.

W. H. Slack, for the defense, testified that he let the appellant have a wagon load of corn in 1879, about corn gathering time. He and Lee Smith assisted appellant to gather the corn. Witness is appellant's father-in-law.

Lee Smith testified that in 1879 he assisted appellant to gather some corn from the land witness rented from Slack. Witness owed Slack some corn. Cross-examined, he said that he rented the McDermott place from appellant, and that appellant told him that he got McDermott's corn and cotton,—about 20 or 25 bushels of corn.

Mrs. Sarah A. Post, mother of appellant, testified that she saw McDermott first at preaching, the next time at appellant's, and the third time at Nelson Post's on October 12th, 1879. On this last occasion she heard him say to appellant: "Jack, you have got horses and wagon already; you can get the rest of the things whenever you want them, as they are yours." McDermott on that day wore a black coat, vest, white shirt, good pants and boots. He and the appellant left in the afternoon, and the latter returned on Tuesday, in the evening.

Cross-examined, the witness stated that McDermott left because of his living in adultery with, and cursing the widow Black.

In rebuttal, Jas. Melton, for the State, testified that

McDermott came in and gave himself up for cursing the widow Black, and gave bond. The State also introduced the minutes of the court to show that McDermott had pleaded guilty and been fined one dollar, and the testimony of the county attorney to the effect that he had agreed with McDermott to wait on him for his fee.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Hurt, J. Jack Post and his brother, Nelson Post, were jointly indicted for the murder of G. B. McDermott. After severing, Jack Post was tried and convicted of murder of the first degree; the jury awarding the death penalty. There are four points raised by bill of exceptions which will first be noticed, and then some observations will be made upon the charge of the court,—that part of the charge which relates to circumstantial evidence.

The first bill calls in question the action of the court in regard to the competency of two of the jurors. When tested, these jurors stated that they had formed an opinion and that evidence would be required to remove the same. Being questioned by the court they stated that they "had never heard witnesses, nor any one who pretended to know the facts, detail them; that the opinion was not definite and fixed; have no present conviction; could render verdict entirely free from any previous opinion." These jurors were not examined further. If a juror has formed an opinion, the opinion formed would very likely remain until removed by evidence, though the opinion be ever so slight; hence it becomes very important to inquire into the means or character of information constituting the basis of the opinion. If the juror has talked with the witnesses, or read what purported to be a correct account of the transaction, the opinion would more likely be definitely settled, and *established.* If, however, it is formed from reports or rumors, the probability that it is fixed or established is very much lessened. While it is true that an opinion from rumor may be so well established as to render the jurors incompetent, yet the source of information becomes of vital importance when considering the extent of the convictions of the juror. As before observed, the most feeble opinion requires evidence of some character to be removed. The fact to be ascertained is whether or not the juror has formed such an opinion as will probably influence his verdict. These jurors swore that they had formed no such opinion. Their examination closing just here, we are of the opinion that they were competent, and that there was no error in holding them as such by the court.

It appears by the second bill that one Dr. Atkinson had testified when this case was on trial before the examining court, and that his evidence had been properly reduced to writing by the justice. Afterwards he left Texas, and went to the State of Arkansas. As a predicate for the introduction of his evidence taken before the examining court, the State proved by one Joline that he had received a letter from Dr. Atkinson, postmarked at Pine Bluff, Arkansas, and that in the letter Atkinson stated that he was practicing there; that the letter was written by Dr. Atkinson. The defendant objected upon the ground that the letter should have been produced. So states the bill, but the judge appends the following to the bill: "No objection to the contents of the letter by parol was made at the time. The predicate laid on the testimony of O. E. Finlay and C. O. Johnson in statement of facts." If the defendant had objected to the proof of the contents of this letter at the proper time, the court should and no doubt would have sustained the objection. Not having thus objected, it comes too late after verdict to urge this objection, for a most excellent reason, to wit: if the objection had been taken when the proof was offered, the State would have remedied the defect by producing the letter or accounting for its non-production.

There was no other objection to the predicate laid for the reading to the jury the evidence of Dr. Atkinson, except that there was "no oath made of the fact of said witness living beyond the jurisdiction of this court." It is not necessary *in limine* to make a formal oath to this fact. Proof that the witness lived beyond the process of this court can be made by the same means as any other fact. This, we think, was clearly done by the evidence of the witnesses Finlay and Johnson.

While upon this subject, we desire to state the rule which we think should govern in a case in which the evidence of a witness has been taken before an examining court. If the deposition is taken before an examining court or a jury of inquest, and is reduced to writing and certified according to law, and the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, and since the deposition was taken the witness has died or has moved beyond the limits of this State, or has been prevented from attending the court through the act or agency of the defendant, or by the act or agency of any person whose object it was to deprive the defendant of the benefit of the testimony, or if by reason of age or bodily infirmity such witness cannot attend, the deposition is admissible. This rule has reference to depositions taken before examining courts. We are not treating of this subject generally. Former decisions of this court state the rule applicable to almost every phase of case. Under the above rule, the fact that the witness is dead or beyond the limits of this State, etc., must be proved by the party seeking to use the deposition. Mere temporary absence from the State will not do; the witness must have "*moved* beyond the limits of the State." In regard to this matter, we find no error in the action of the court below.

From the third bill it appears that the State, over the objection of defendant, proved, on cross-examination of a witness for the defense, "that Post (the defendant) told him he got McDermott's corn and cotton,—about twenty or thirty bushels of corn." This evidence was clearly admissible. It is in evidence that defendant had neither corn nor cotton, and that, just after the murder, he was found in possession not only of corn and cotton, but of the stock, wagon and household goods of deceased. That these facts were elicited from defendant's witness, upon cross-examination, constitutes no error. This matter is entirely within the discretion of the court below, and, if not abused to the injury of the defendant, will not be revised by this court.

It seems from the fourth bill that the State offered to read to the jury certain articles of the Penal Code; to which the defendant objected, and his objection was overruled by the court. By reference to the statement of facts it will be seen that Mrs. Post, mother of the defendant, testified that McDermott left because he was living in adultery with, and for cursing one widow Black. The State introduced the record of the trial of McDermott for the breach of the peace, in which it appears that deceased had been fined one dollar, and proved by the county attorney that deceased had arranged with him for his fee. To meet the charge of adultery, we suppose the articles of the Code were read. To us this last was an anomalous proceeding indeed; and if there was the slightest tendency to injure the rights of the defendant we would be compelled to reverse the judgment. The rule, however, on this subject is this: "If the evidence goes to establish a fact material and pertinent to the issue, if admitted, and is illegal, its admission would be erroneous and must be held so by this court." *Williams* v. *State*, 44 Texas, 116. Nor does the fact that there is other sufficient and competent evidence to support the conviction alter the rule. In this case, however, we fail to see the pertinency or materiality of the evidence, nor does it appear that the slightest injury was inflicted upon the defendant by its introduction. If it had a tendency to prove a material fact for the prosecution, or if it tended to weaken a material fact proved by defendant, or if it tended to prejudice the defendant in the estimation of the jury, having been objected to by him, we would feel inclined to reverse and remand the case. But, on the other hand, if this court must reverse for every irregularity, though objected to, whether it tended to injure the defendant or not, it would be almost impossible in a great many cases to legally convict. The action of the court in this matter was wrong, but no injury appearing therefrom we cannot make it a ground for reversal. This disposes of all the bills of exception. We are not limited to these, however, for if by bill or otherwise, errors in the record appear calculated to injure the rights of defendant, we will consider them whether pointed out by bill, motion for new trial, or assignment of errors.

In this connection we desire to notice a certain part of the charge of the court which is as follows: "When the State relies upon circumstantial evidence alone in order to warrant a conviction, each fact necessary to the conclusion sought to be established must be proved by competent evidence *beyond a reasonable doubt;* all the facts must be consistent with each other, and with the main fact, sought to be proved, and the circumstances taken together must be of a conclusive nature and leading upon the whole to a satisfactory conclusion, and producing in effect a reasonable and a moral certainty that the accused and no other person committed the offense charged. The circumstances should not only be consistent with the defendant's guilt but inconsistent with any other reasonable hypothesis or rational conclusion consistent with the facts of the case. Circumstantial evidence is often as cogent and conclusive upon the understanding as direct and positive evidence, and all the law exacts from the jury in such a case is that their minds should be satisfied beyond a reasonable doubt of the guilt of the prisoner."

There was no objection taken at the time to that part of the charge which attempted to bolster circumstantial evidence. To us it is passing strange indeed that such a charge should be given in any case, for there is an unbroken line of decision in this State, condemning in the clearest and most unqualified terms, this character of charge. We will cite some of the cases bearing upon the subject: *Walker* v. *State*, 42 Texas, 373; *Stuckey* v. *State*, 7 Texas Ct. App. 174; *Harrison* v. *State*, 8 Texas Ct. App. 183; *Harrison* v. *State*, 9 Texas Ct. App. 407.

If we could presume that this charge was calculated to injure the rights of the defendant, the judgment would be reversed though not excepted to at the time, but as the very able attorney who represented the appellant, and heard the charge read to the jury, did not see any injury at that time, and as we fail to perceive any, though a charge upon the weight of evidence, we cannot hold it such error as will warrant a reversal of the judgment. However, if it had been objected to, we would have been compelled to reverse. The rule upon this state of case is very clearly and concisely stated in the Walker case, cited above: "A charge upon the weight of evidence is not necessarily a ground for reversal, unless it appears by bill of exceptions that it was objected to at the time it was given, so as to enable the district judge to correct it or withdraw it from the jury, if he should think proper to do so." (Arts. 1497 and 1505, Code Crim. Proc.) "If the defendant fails to except at the time, he may still make it a ground for motion for new trial, and then, if it appears so flagrant and as a matter in issue of vital importance, so as to make it error, as it must be — being contrary to law — but also a material error calculated to injure the rights of the defendant, then it will be good ground for new trial, the refusal of which, if made on such ground, will authorize this court to reverse the judgment of conviction in case of felony."

Applying these rules, and viewing the obnoxious charge in the connection in which it stands, it being in such close juxtaposition with that which is very favorable to defendant and calculated to control and modify its effects, we do not think such injury has been done the defendant as will justify a reversal of the judgment. We cannot leave this subject without expressing the hope that we may never be called upon to pass upon another such charge.

Appellant assigns for error that the judge appointed a foreman of the jury. There was no objection to this at the time; if there had been, we make no doubt the court would have corrected this matter. Being in the habit of appointing foremen led to this error no doubt, and if the attention of the court had been called to the Code at the proper time, the correction would have been made. In this matter no injury appears to have resulted to the defendant. If, however, there had been an objection taken at the time, and the court had persisted, being in direct violation of the Code we would have presumed a wrong motive, and reversed the judgment. This, however, is not the case.

There are a great many points raised by the defendant, but we do not think any are well taken. We have noticed those thought to be the most serious, and have found nothing thus far to authorize us in disturbing the judgment of the court below. The evidence discloses a case of murder of the first degree, committed in the perpetration of robbery. That the defendant is the guilty party, or one of them, there cannot be the slightest doubt. Just after the murder of McDermott, defendant was in the possession not only of his horses, wagon, corn and cotton, but the bloody fruits of the foul murder. The proof was full and complete, and was made so from a great many different sources. There remains nothing left to us but to approve the judgment. Though the appellant is not represented here by counsel or brief, we have endeavored to give to this record our most serious attention, in order that if there had been such error committed upon the trial as would justify a reversal, we might discover it, and extend relief to the defendant by reversing the judgment and remanding the cause for a new trial. None such has been discovered.

We are therefore compelled to approve the judgment of the court below.

Affirmed.

NELSON POST v. THE STATE.

1. EVIDENCE.— Conspiracy between the appellant and another to commit the offense of murder and robbery having been shown, not only the acts, declarations and conduct, but also the financial condition of his co-conspirator (in connection with his possession of effects of deceased) prior to the consummation of the conspiracy, were admissible in evidence against the appellant.
2. SAME.— The conspiracy having been shown, a bill of sale purporting to be a conveyance by the deceased to the co-conspirator of the appellant of certain effects of the deceased afterwards found in possession of the co-conspirator was properly admitted in behalf of the State.
3. SAME.— The declaration of the co-conspirator that he had hired the appellant to haul the property not having been made by the co-conspirator in the presence of the appellant while the latter was in the act of hauling the property was properly excluded from the jury, notwithstanding the State relied on the act of hauling as a fact inculpatory of the appellant.
4. PRACTICE — CHARGE OF THE COURT.— If, upon request of the jury, in explanation of his instructions, the judge gives an additional charge, confining it to the subject matter of the request, he commits no error. He cannot, however, go beyond the request.

5. Same.— The defendant failing to call in question, either by bill of exception or in his motion for new trial, the action of the trial court in giving or refusing charges asked, and no prejudice to appellant being shown, this court will not disturb the judgment on that account.

Appeal from the District Court of Young. Tried below before the Hon. T. L. Hutchison.

This is the companion case of Jack Post (*ante*, p. 579) for the murder of G. B. McDermott, in Young county, Texas, on the 15th day of October, 1879. The trial was had upon the same indictment, and resulted in a like verdict of murder in the first degree, but the punishment was assessed at a life-term in the penitentiary. The conviction was secured upon essentially the evidence embodied in the report of Jack Post's case; the few material differences being indicated in the opinion.

No brief for the appellant.

J. H. McLeary, Attorney General, and *H. M. Holmes*, for the State.

Hurt, J. The defendant was jointly indicted with his brother, Jack Post, for the murder of G. B. McDermott. Upon a severance the defendant Nelson Post was placed upon trial, found guilty by the jury of murder of the first degree, and his punishment assessed at confinement in the penitentiary for life. Several points raised by the bills of exception and urged in a motion for a new trial were discussed and decided in the opinion in the case of Jack Post, to which reference is made. (*Ante*, p. 579.)

There are some questions in this case, however, which did not arise in the former. We are informed by two bills of exceptions that the State proved, over the objections of the defendant, that "Jack Post was financially broke, and without means, and that he had stated that he had bought the property from McDermott for $125, and that he had borrowed the money from Tom Trout." The property alluded to was that of the deceased.

Having fully shown a conspiracy between these brothers, not only the pecuniary condition of Jack Post, but his declarations, acts and conduct were admissible if occurring before the consummation of the conspiracy. The bills fail to show that the declarations of Jack Post were after the murder, and bearing directly upon this point the judge appends the following: "The testimony complained of in this bill, except that as to the financial condition of Jack Post, was not admitted on the trial. Throughout the trial the court steadily and persistently excluded all the declarations of Jack Post, made in the absence of the defendant on trial, save those coming properly within the rule of conspiracy as defined by the charge." This eliminates from the bills all that is obnoxious. The records contains two bills which are precisely the same, hence the use of the singular number by the judge.

By reference to the statement of facts it will be seen that the connection of the defendant with the bill of sale is amply shown to authorize its introduction. His connection therewith, read in the light of the facts which immediately surrounded it, forms one of the links in the chain of criminative facts which not only tends to fasten guilt upon him but to establish the conspiracy between him and his brother Jack. Hence the error complained of in his second bill does not exist.

Under the fifth bill it appears that the defendant offered to prove that Jack Post said that he had hired Nelson Post to help him haul the McDermott property. The county attorney objected, and the court sustained the objection. The State relied upon the fact that the "defendant had hauled the property, as an inculpatory fact." If, therefore, this statement of his brother had been made in his presence, and while in the act of hauling, or if it had been made by defendant while in the act of hauling or when his connection with the property was challenged, it would have been admissible. This not being the case, it was not evidence. *Cameron* v. *State*, 44 Texas, 652.

The jury returned into court and through their foreman inquired if the defendant could be found guilty as accessory or accomplice to the murder; whereupon the court inquired if the jury understood the charge of the court defining principal offenders. The foreman answered that some of them did not. Then upon request of the jury, the judge gave the additional charge which is complained of in defendant's bill No. 6. In this we find no error. If the judge had gone beyond the subject-matter contained in the request, in giving an additional charge, then an error would have been committed. This was not done. See art. 614, Code Crim. Proc.

We have noticed all of the exceptions of the defendant save those treated of in the Jack Post case, and we have found no such error as will warrant a reversal of the judgment.

The defendant asked of the court certain special charges which were refused, but there was no bill reserved nor was the action of the court in this respect complained of in the motion for new trial. There were no bills of exception taken to the charge of the court, nor did the defendant complain of the charge in his motion for new trial further than that the court erred in charging upon the subjects of conspiracy and principals. This charge, we think, was demanded by the case as made by the facts. We cannot approve of all parts of the charge, but as there was no objection made by the defendant, and no injury appearing therefrom, we would not be authorized to disturb the judgment. That the defendant, Nelson Post, and his brother Jack murdered G. B. McDermott we have not the least doubt, if the witnesses are worthy of belief; and we have no reason to question their integrity.

There being no error disclosed by the record, we are necessarily compelled to affirm the judgment.

Affirmed.

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F. W. ROBERTSON, JR., *v.* THE STATE.

1. CHARGE OF THE COURT.—A charge was objectionable that instructed the jury "if you can reasonably account for or explain the facts and circumstances in evidence before you in this case in any way consistently with defendant's innocence, without resorting to unreasonable facts and theories, then you should do so and acquit. But if you cannot account for nor explain the facts and circumstances detailed before you in this case upon any reasonable ground consistently with defendant's innocence, then if you cannot do this you should convict."
2. EVIDENCE.—See the opinion in this for a *resumé* of evidence held insufficient to sustain a conviction for an assault with intent to commit robbery.

APPEAL from the District Court of Williamson. Tried below before the Hon. W. A. BLACKBURN.

The opinion discloses the case.

Makemson, Fisher & Price, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. This appeal is from a judgment of conviction for an assault with intent to commit the offense of robbery, alleged to have been committed upon one A. C. Shamblin in Williamson county, on October 3, 1877. The trial in the court below commenced on January 13, 1881, and on that day a jury was impaneled and sworn, and the defendant entered his plea of "not guilty." The jury returned their verdict on the 14th day of January, 1881; by which the defendant was found guilty of an assault with intent to commit the offense of robbery, and his punishment was assessed at confinement in the penitentiary for a term of two years.

The principal witnesses relied on by the prosecution for a conviction, on the trial below, were A. C. Shamblin, John Bonner, and Dick Ray. There were several other witnesses introduced on behalf of the State, for the purpose of proving isolated facts and circumstances, or for certain special purposes. The main facts, however, which connect the defendant with the crime charged against him, other than isolated circumstances upon which reliance is placed, is the testimony of the three witnesses, Shamblin, Bonner and Ray. The important features of the testimony of each of these three witnesses may be stated, briefly, as follows: The witness Shamblin is the person upon whom the assault is alleged to have been committed. His testimony comes before the court free from any taint of suspicion that it is anything else than a truthful narration of the transaction as seen by himself. This witness testified that on Wednesday, October 3, 1877, on the public road between Georgetown and Round Rock, and near the latter place, in Williamson county, Texas, a man attempted to rob him. It was a mile or two from Round Rock, where the road crosses a branch where there is a thicket of timber and brush on one side of the road. The witness had a wagon and team and four bales of cotton, and was on his way to Austin, and had also about five dollars in money with him. It was about one hour after sun-up. The man came out of the brush without any coat on, and was bare headed, and had on goggles. He told the witness that he had a sick friend there and asked witness to take him on his wagon to Round Rock. Witness assented and started to help him bring the sick man, when he (the man with the goggles) drew a pistol on the witness and said for him, witness, to lie down,—that he was going to tie the witness, and take his wagon and team and cotton to Round Rock, and sell them. The witness says he was frightened and thought at first that the man might kill him, and started to lie down, but raised up before he was entirely down and told the man that no one man could make him do that, and bluffed him off. The man began to back and said if he, the witness, would promise not to say anything about it, he would let him alone; and the witness promised. Witness then went back, got on his wagon and went on. He says the man who tried to rob him was about the size of the defendant, and had black hair. He says he was working four horses, two of which were paints. On cross-examination this witness said, giving his language as found in the statement of facts: "I do not say it was defendant who attempted to rob me, because I do not know. * * * The man that attempted to rob me had black hair, and had no mustache; the defendant has red hair and red mustache. I do not recognize the defendant as the man."

The witness Bonner testified that he knew nothing about the commission of the offense except what the defendant told him. He then proceeds as follows: "On Friday night of the Fair week in Belton, 5th October, 1877, the defendant came to my room and called me at the window. It was 12 o'clock at night. I knew him well, for we were intimate. He told me that he had been to Austin and Round Rock, and that near Round Rock he attempted to rob a man who had a wagon and some cotton. Defendant said he was disguised; had on goggles, and had had his hair dyed by a barber in Round Rock. Said he told the man he had a wounded friend, and asked him to take him on his wagon to Round Rock; that the wagoner got down and followed him a piece from the road, and he drew a pistol on the man and told him to give up his money and lie down and let him tie him, or he would kill him; said he intended to tie the man and take his cotton on to Round Rock and sell it, but saw a man passing along the road and was afraid the wagoner would see him too and give the alarm, so he told the wagoner he would let him off if he would say nothing about it, which he agreed to do. He said the man was working a paint horse in his team. I know defendant is the man who came to my window and told me of trying to rob a man near Round Rock. The Belton Fair began that year on Tuesday, the 2d of October." On cross-examination Bonner stated: "I am not friendly with defendant. I have, or rather my father has, employed counsel to prosecute this case. I am indicted in Bell county for robbery of Tobles' jewelry store. Defendant is also charged with same robbery. I was arrested in the fall of 1877, and taken to Bell county. Defendant told me he went to Waco after the robbery and got a barber to remove the dye from his hair, and said the damned barber never did get it all off his eye-brows. The defendant told me this on Friday, October 5th, 1877; it was 12 o'clock at night."

The witness Ray, after testifying that he knew the reputation of John Bonner in the neighborhood where he lived for truth and veracity, and that it is good, says: "On the night of the 4th of September, 1878, I went, at the request of John Bonner, and concealed myself in a tree near Belton, and Bonner went off and returned with defendant, F. W. Robertson, and they were talking when they came up under the tree, and I heard the defendant say, 'Shamblin could not swear to me, and if the negro barber swears to blacking my hair I will kill him.' I knew it was defendant with Bonner, for I know him well and know his voice; was near him." On cross-examination he said: "I thought it was about 9 o'clock when defendant and Bonner came under the tree; it might have been later; I had no watch. It was a bright moonlight night. I was in an elm tree."

There was other testimony tending to show that the defendant was at and about Round Rock at a time not generally stated with distinctness, but evidently introduced in order to show the proximity of the defendant to the scene of the offense at the time of its commission, as a circumstance tending to connect the defendant with its perpetration. These witnesses, without exception, when the color of the defendant's hair or beard is mentioned, say it was red. The assaulted party having testified that the man had *black hair* and *no mustache,* and that the defendant has red hair and red mustache, it became necessary that the State should make further proof of the connection of the defendant with the crime charged against him. It was evidently attempted to supply this necessary link in the testimony by showing that the defendant had disguised himself for the purpose of preventing his identification, and, in addition to employing goggles, as the assaulted party testified, that he had gone to a barber and procured his naturally red hair and beard to be dyed black, and this proof is attempted to be supplied by the evidence of Bonner and Ray, in the manner above set out. In this connection, before proceeding further, we desire to express our admiration at the usefulness and the necessity of the right of cross-examination of a witness. In the present case by this means it was developed, not only that the party upon whom the assault was alleged to have been committed was unable to identify the defendant as the guilty party, and also that the witness Bonner was not only at enmity with the defendant, but that in all probability he had a deep interest in securing a conviction of the defendant. The witness Ray if left alone proves but little except that he, for some cause unexplained, was a willing instrument in the hands of the witness Bonner in placing himself at Bonner's instance in a position where he could play the eavesdropper on the defendant and overhear a part of a conversation between him and Bonner, in which, it is contended, the defendant made an admission tending to support the idea that the defendant had disguised himself in order that he might perpetrate this particular crime without being recognized. It is not shown that the defendant had disguised himself either by dyeing his hair or otherwise, except by the reproduction of his midnight admission to Bonner, supported as it is by the statement of Ray as heard by him from his position in a tree. It is not to be overlooked that the witness Shamblin testified that the man who made the attempt to rob him had no mustache, whilst it is not shown that he had a black mustache even in the interview with Bonner or in the conversation overheard by the witness Ray.

The testimony by which it was attempted to identify the defendant with the attempt at the robbery and to avoid detection and being identified by having dyed his hair, coming as it does, is, to say the least, very meagre and unsatisfactory as a foundation upon which to base a conviction for a felony. We would not feel warranted, however, in setting the verdict aside on this ground alone, except that to permit the judgment to stand would be to sanction a precedent dangerous to the citizen when the demands of the law had been fully complied with in other respects.

In this case we are unable to say that all the rights of the defendant were properly guarded in the instructions given to the jury on the trial below. In our opinion the following paragraph of the charge is not entirely free from objection: "If you can reasonably account for or explain the facts and circumstances in evidence before you in this case in any way consistently with the defendant's innocence, without resorting to unreasonable doubts and theories, then you should do so and acquit. But if you cannot account for nor explain the facts and circumstances detailed before you in this case upon any reasonable ground consistently with defendant's innocence, then if you cannot do this you should convict." A charge quite similar to the one here under consideration, and given under like circumstances, though not absolutely condemned in terms, was criticised unfavorably by this court in *Estep* v. *State,* 9 Texas Ct. App. 369. A defendant in a criminal prosecution enters upon a trial shielded by the presumption of law that he is innocent of the crime of which he is accused, which presumption abides with and protects him from punishment, until his guilt is established by the proofs adduced against him. The language of the law is this: "The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence; and in case of reasonable doubt as to his guilt he is entitled to be acquitted." Code Crim. Proc. art. 727. "Every person accused of an offense shall be presumed to be innocent until his guilt is established to the satisfaction of those whose province it is to try him." Penal Code, art. 11.

We are constrained to say that with these plain principles of the statute law staring us in the face, it is erroneous, especially in a case of doubtful evidence as to guilt, for the court by its charge to direct, or even permit the jury to go in search of evidence by which they can find a reasonable explanation of the facts and circumstances consistent with the defendant's innocence before they would be warranted in acquitting, when the law presumes that he is innocent independent of all those facts and circumstances until his guilt is established by legal evidence. If the evidence leaves the case involved in reasonable doubt as to his guilt, that doubt inures to the benefit of the defendant, and the law says he is entitled to be acquitted. An instruction on the presumption of innocence and reasonable doubt is a proper and necessary charge in all criminal trials, but as a general rule experience has demonstrated that a charge embracing the language of the

Code, without elaboration or attempt at explanation, is amply sufficient. *Massey* v. *State*, 1 Texas Ct. App. 563, and cases cited in note 215, p. 538, Clark's Crim. Laws of Texas. The charge of the court, whilst in other respects so far as observed it was an admirable as a correct enunciation of the law of the case, was in our opinion marred in this feature, and the jury were liable to be led to an erroneous conclusion to the injury of the defendant. Except in cases where the inculpatory facts depend upon circumstantial evidence, a charge on the presumption of innocence and reasonable doubt couched in the language of the statute has uniformly been held sufficient; but, when a conviction depends alone upon circumstantial evidence, a proper charge on that character of evidence is required by the rulings of this court. *Barr* v. *State, ante*, p. 507, and authorities there cited.

It seems from the supplemental motion of the defendant for a new trial, and from affidavits appended thereto, that it was a matter of considerable moment as bearing upon the main defense of the accused, which was that of *alibi*, to determine when a certain Methodist quarterly conference or camp meeting came on, and that this was an incidental question which was not developed until after the trial had begun. It is not seen that the testimony bearing upon the subject was of a nature which the defendant or his counsel could reasonably have anticipated in preparing for trial. Still we are not assured that in strictness of law the testimony said to be newly discovered was of sufficient materiality and importance to require a reversal of the judgment. We have not deemed it important to discuss in this opinion any of the other questions presented by the record and discussed in argument.

In view of the peculiar features of this case, and considering the meager and unsatisfactory character of the testimony, together with the liability of the charge to mislead the jury, and the probability that the defendant will be able on another trial to settle definitely the time when the Methodist meeting was held, as that fact bears upon the defense of *alibi*, taken altogether, we are of opinion the ends of justice and a due administration of the law required of the court below that he should have granted the defendant a new trial; and the refusal of which was, in our opinion, an erroneous ruling of the court for which the judgment will be reversed and the case remanded.

Reversed and remanded.

JOHN AIKEN *v.* THE STATE.

1. CONTINUANCE.—Even a first application for a continuance, though conforming to the requirements of the statute, is now no longer a matter of right, but its truth and merits are addressed to the sound discretion of the trial court, and if overruled will be again considered by that court on the motion for new trial, in connection with the other evidence in the case.
2. SAME — PRACTICE IN THIS COURT.— In passing upon the refusal of a continuance asked on account of the absence of a witness, the evidence adduced on the trial is likewise considered by this court for the purpose of determining whether the desired testimony was probably true, as well as whether it was material if true.
3. SAME — EVIDENCE.— The statement of a witness that a third party had admitted to him the commission of the offense for which the accused was on trial is inadmissible because hearsay, and hence a continuance should not be granted for its production.
4. EVIDENCE — FLIGHT.— Evidence that the accused fled after the commission of the offense, together with the circumstances attending his flight, is legitimate proof for the consideration of the jury, in connection with the other inculpatory evidence.
5. NEGLIGENT HOMICIDE is a killing which can only be predicated upon facts showing "no apparent intention to kill."
6. MALICE.— Though malice is the essential ingredient of murder, the principle is elementary that this specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life as shows a man to be an enemy to all mankind; as when a man resolves to kill the next man he meets and does kill him; or

shoots into a crowd wantonly, not knowing whom he may kill. See the opinion for discussion of the principle.

7. Same — Intent. — It is expressly provided by the statutes of this State, that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."

Appeal from the District Court of Milam. Tried below before the Hon. W. E. Collard.

As the passenger train on the International Railway was leaving the town of Gause in Milam county, at 3 o'clock on the morning of May 7th, 1874, bound west, a shot was fired from the depot platform through the window of, and into the last or rear car, and J. B. Scobee was struck in the neck by a pistol ball, receiving a wound from which he died a few days later. On the 3d day of January, 1876, the grand jury of Milam county presented an indictment in the District Court, charging this appellant with the murder of the said Scobee. He was arraigned on the 19th day of May, 1881, and his trial culminated on the 21st day of the same month, in a verdict of guilty of murder in the second degree, and fifteen years in the penitentiary assessed as punishment.

J. R. Fraim, for the State, testified that at about 3 or 4 o'clock A. M., May 7, 1874, himself, S. N. Bailiff, Geo. Hurt and Dr. McGehee boarded the west-bound train at the depot at Gause, to go to Rockdale, taking seats in the next car to the last. Just as the train began to move, some person on the platform of the depot broke the glass out of the car window near where the witness and those with him had seats, and almost immediately he heard a single report from fire-arms and saw from the flash that it was fired from the platform. When the train had moved 300 or 400 yards, the conductor came into the car occupied by witness and others and informed them that a man in the car behind had been shot. Witness and others went into the rear car and found J. B. Scobee shot in the neck and lying on one of the last seats in the car, and on the side of the car opposite from the Gause depot. A hole was found shot through the glass of the last window, opposite Scobee, and on the side next to the Gause depot. The train proceeded to Rockdale, where Scobee was taken to a private house, in which he died three or four days later. The witness saw him in Rockdale about three days after he was shot, and he was then dying.

Dock Hurt testified, for the State, that he was in Gause attending a ball on the night of May 6th, 1874, which was in progress when the west-bound train arrived, and he and his brother Jake went to the depot. He saw the defendant and his brother, Ed. Aiken, standing on the platform. While standing there he saw the defendant punch one of the car windows out with his pistol. The witness immediately said to his brother Jake "this is no place for us," and turned to leave. Just as he turned, a pistol fired from the place where the defendant was standing, a distance of between ten and twenty feet from the position of the witness.

On his cross-examination this witness stated that it was late at night when the shooting occurred, but he could not remember the hour, or whether or not it was before or after midnight. There were not a great number of persons on the platform at the time. The witness, defendant and others ran from the ball-room to the depot when the train arrived. The witness was at one time in the employ of the International railroad, but was not at the time of the shooting, nor at the time of this trial.

E. W. Courtney testified, for the State, that on the night the train was fired into, he was lying on a pile of lumber near the ball-room. When the train whistled he heard some one at the other end of the pile say "there is that d—d train now." The parties ran to the depot and the witness followed to see the train, and stood within ten feet of them. One of them was Ed. Aiken, and the other the witness took to be defendant. Just as the train moved off a shot was fired from where the two Aikens stood, and was fired by one of them. The two then left, going towards the ball. The witness had no intimate or especial acquaintance with the Aikens, but knew them when he saw them. He had seen neither of them since May, 1874, until on this trial, and did not at first on this trial recognize the defendant as John Aiken, nor did he while testifying feel absolutely positive that the defendant was the same man he took to be John Aiken on the night of the shooting.

The cross-examination elicited from this witness the statement that the defendant, his brother Ed. Aiken, and many others were drinking a great deal that night, and that a great many shots were fired in town, but no more than one from the depot platform.

Isaac Sparks testified, for the State, that he was at the ball that night, but not at the depot. Early on the morning of the 7th of May, after the defendant had returned to Fraimville, he told the witness, during a conversation in a back room of a store kept by J. R. Fraim and Enos Aiken, defendant's brother, that he had shot into the train. The witness told him that if he had, he had best say no more about it. This statement he made voluntarily, and he was not then under arrest. The defendant was drunk at the ball, and at the time of the conversation referred to was somewhat under the influence of liquor, but was not boisterous or stupid.

The occurrences at the depot were detailed by S. N. Bailiff exactly as they were by the first witness, Fraim. In addition he testified, for the State, that a few days after the shooting, the defendant and his brother were tried on *habeas corpus* for shooting Scobee, and were discharged. After the *habeas corpus* trial the witness and defendant rode to Fraimville together, and *en route* the defendant told the witness that during the *habeas corpus* trial he thought his brother Ed. would be convicted, and that if such had been the result he, the defendant, would have got up and told the judge that it was he, John Aiken, who shot Scobee. At the ball-room, an hour or two before the arrival of the train, Enos Aiken, a brother of the defendant, asked the witness to assist him in getting defendant and Ed. away, saying that they were in a difficulty with Wm. Ditto. The witness went to the defendant, who was in the act of drawing a pistol, wrenched the pistol from his hand and took him out of the house.

Cross-examined the witness stated that the defendant was drunk at the ball; that many shots were fired in Gause that night, but only one from the depot platform. Eight or ten months before this trial the witness received from the Governor of Texas an appointment to go to Arkansas and arrest the defendant. He held these papers about six months, making no attempt to arrest the defendant, further than writing one letter to Arkansas, to which there was no reply received. He returned these papers about the last of December, 1880. At the time of the *habeas corpus* trial the witness was a friend to the defendant, and did all he could to assist him.

For the State, Thomas Oswalt testified that on May 7, 1874, at about 10 o'clock, A. M., the defendant came to him where he was at work on the Aiken farm near Fraimville, and said "I have played h—ll! I shot into the train at Gause last night." In the evening of the same day the defendant again came to where witness was and said "I have heard that a man was shot when I fired into the train last night." These statements were voluntary. The defendant was not under arrest, nor was there an officer present.

The arrest of the defendant at about daylight in the morning, in a corn-crib, sixty or seventy yards distant from a dwelling house, in Garland county, Arkansas, having a shot-gun lying by him, was proved by the evidence of Lewis, deputy sheriff of Milam county. The deceased died from the effects of a gun-shot wound in the neck, as was testified by Dr. A. C. Walker.

For the defense, a number of witnesses testified positively that the defendant was lying on a bench in the ball-room, drunk and asleep, when the train arrived at the depot, while it remained there and when it left, and detailed their means of knowledge circumstantially and in detail. Evidently for the purpose of affecting the testimony of two of the State's witnesses who had testified that Dr. McGehee was of the party who boarded the train at Gause, several witnesses for the defense testified positively that the Doctor remained in the ball-room and did not go to the train at all. It was also attempted by the defense to prove by one witness that one Crunk, since dead, had admitted to him that he, Crunk, did the shooting; but this evidence was excluded.

In rebuttal the State recalled Messrs. Fraim and Bailiff, who testified positively that Dr. McGehee did board the train with them, examined the wounded man, and accompanied them to Rockdale. Dr. McGehee was shown to be dead.

Chandler & McGregor, and *E. P. Lott*, for the appellant.

H. Chilton, Assistant Attorney General, and *W. K. Homan*, for the State.

WHITE, P. J. On the 10th day of January, 1876, the indictment in this case was returned into court, charging appellant with the murder of one J. B. Scobee, in Milam county, on the 7th day of May, 1874. He was brought to trial on the 17th day of May, 1881, and on the 21st a verdict was returned against him for murder in the second degree and affixing "his punishment at fifteen years in the penitentiary."

An application for continuance was made by defendant, which was controverted as to diligence by the district attorney, supported by affidavits as provided by statute. Code Crim. Proc. art. 564. This application was overruled by the court, and this ruling having been duly reserved by bill of exceptions is the first error complained of. Even a first application, though in conformity with the requirements of the statute, is now no longer a matter of right, but its truth and merits are addressed to the sound discretion of the trial court, and if then overruled will be considered by that court again on the motion for new trial, in connection with the other evidence in the case. Code Crim. Proc. art. 560, subdivision 6th. In passing upon the refusal of a continuance asked on account of the absence of a witness, the evidence adduced on the trial is likewise considered by this court for the purpose of determining whether the desired testimony was probably true, as well as whether it was material if true. *Dowdy* v. *State,* 9 Texas Ct. App. 292; *Sheckles* v. *State,* 9 Texas Ct. App. 326; *Lyons* v. *State,* 9 Texas Ct. App. 636. It is hardly probable, if the absent witnesses Hurt and Joe Aiken had testified to the proposed facts stated in the application, that such testimony would have been true when so much other testimony is exhibited directly contradicting it, not the least important of which testimony was more than one voluntary statement made by defendant himself, that he was the party who did the shooting. If the other witness, Davidson, had been present, his testimony that Black Crunk, who had since died, had admitted to witness that he, Crunk, had fired the fatal shot would not only have been wanting in probability of truth, but would have been hearsay and inadmissible as evidence. "On an indictment for murder, the admissions of other persons that they killed the deceased, or committed the crime in controversy, are not evidence." Whart. Crim. Ev. sec. 225; *Sharp* v. *State,* 6 Texas Ct. App. 650; *Boothe* v. *State,* 4 Texas Ct. App.

202; *Krebs* v. *State*, 8 Texas Ct. App. 1; *Means* v. *State*, *ante*, p. 16. There is no testimony going to show that Crunk was at or near the scene of the shooting at the time it occurred. Nor did the court err in refusing to allow the witness Smith to testify to these same facts on the trial.

It is no longer a question in this State that flight and the attendant circumstances are legitimate matters for the consideration of the jury in connection with the other inculpatory evidence. *Gose* v. *State*, 6 Texas Ct. App. 121; *Blake* v. *State*, 3 Texas Ct. App. 581; 58 Ala. 335. The fact that defendant was arrested in Arkansas and brought back for trial brings the point directly within Blake's case, *supra*. There was no error in permitting the introduction of the testimony.

Quite a number of objections are urged to the charge of the court, but upon a careful consideration we fail to see that they are tenable. Only one is deemed necessary of notice. It is said that the charge is insufficient in that it did not submit the law of negligent homicide. As shown by the evidence, the case was not and could not be one of negligent homicide, which can only be predicated upon facts showing "no apparent intention to kill." Penal Code, art. 584; *Robbins* v. *State*, 9 Texas Ct. App. 666.

It is true that malice is the essential ingredient of murder, but the principle is elementary that "this specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life as shows a man to be an enemy to all mankind; as when a man resolves to kill the next man he meets and does kill him; or shoots into a crowd wantonly, not knowing whom he may kill. 4 Black. Com. 200. In such a case it may well be said that he has malevolence towards the particular person killed, because he was one within the general scope of his malignity." *McCoy* v. *State*, 25 Texas, 33; *Lopez* v. *State*, 2 Texas Ct. App. 204.

Mr. Wharton says "Where an action unlawful in itself is done with deliberation and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder." 2 Whart. Crim. L. (6th ed.) sec. 967. It is expressly provided by our statute that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act." Penal Code, art. 50. And, as was said by Ch. J. Roberts in McCoy's case, "a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." 25 Texas, 42.

Appellant, according to the evidence, fired his pistol into the window of a passenger car of a railroad train in which, it is also shown, he must have known and did know there were passengers. Deceased was struck in the neck by the ball, and died in a day or two thereafter from the effects. A more reckless disregard of human life was never shown and can scarcely be imagined, and the dastardly act under the circumstances developed is and could be in law nothing short of murder. We have found no error in the proceedings which resulted in his conviction of murder of the second degree; and the judgment assessing his punishment at fifteen years' imprisonment in the State penitentiary is in all things affirmed.

Affirmed.

HARRY HILL *v.* THE STATE.

1. JURY LAW.—The law regulating the organization of juries in criminal trials does not confide to the trial judge a discretionary power to excuse a juror summoned on a special *venire*, and such action on the part of the court is error notwithstanding the defendant did not interpose instant objection, and notwithstanding that he did

not exhaust his peremptory challenges. See the opinion *in extenso* on the question.

2. Charge of the Court.—When the evidence in a murder trial has even the least tendency to bring the case under the provisions of arts. 570 and 572 of the Penal Code, it is incumbent on the court to give in charge to the jury the law governing such defenses, and they must be stated distinctly. See the opinion for a charge *held* error as blending the two articles.

Appeal from the District Court of Fort Bend. Tried below before the Hon. W. H. Burkhart.

The indictment charged the murder of W. R. Croxton. The conviction was for murder in the second degree, with the penalty assessed at a term of 25 years in the penitentiary.

Mrs. Croxton, the wife of the deceased, was the first witness for the State. She testified that on the evening of January 12, 1878, the defendant rode up to the house occupied by the deceased and the witness, called the deceased out of the house, and told him that he wanted the rent for the house. The deceased told him that he had no money, but would go to the defendant's mother's house on Monday morning following, and work the debt out. The defendant replied that he did not want work but wanted money. As the deceased spoke of working the debt out, he stepped up to the defendant, who did not dismount from his horse, and placed his hand on the defendant's knee. About this time, the witness, who up to this time was standing on the gallery, turned to go into the house. Her daughter Parthena called out to witness "look at papa." The witness looked and saw her husband staggering, and bleeding profusely from a cut in the right arm below the elbow, and from which wound he died in a few minutes. While talking to the deceased the defendant's horse stood fronting the house. There was an open cistern between the gallery of the house and where the defendant stood on horseback.

The horse ridden by defendant appeared very restless during the interview between deceased and defendant.

Between the testimony of this witness and that of her daughter, Parthena, there is no material variance. The latter, however, saw the blow when it was inflicted, though she did not see the weapon. She, however, located her father, the deceased, on the left side of the defendant, whereas her mother was equally positive that he was standing on the defendant's right side, when he was cut. It was shown that the wound was on the right arm, and that it severed the radial artery. The attending physician testified that if he could have reached the wounded man fifteen minutes sooner than he did, he could have preserved his life by stopping the flow of blood.

Larkin Tolliver testified, for the defense, that at the time of the difficulty he was passing the house occupied by the deceased, and which was rented from the defendant's mother. He stopped his wagon on hearing some words which indicated an altercation between the two, and approached within sixty feet of the gallery, and took his position behind a large mulberry tree. He saw the deceased take hold of the bridle rein of the defendant's horse, and attempt to force the horse and rider into an unclosed cistern. In order to release his horse, the defendant cut the deceased on the arm.

The defense relied upon was self-defense, and the testimony to establish it was that of Larkin Tolliver, to the effect that the defendant cut the deceased in order to prevent the latter from pushing him and his horse into the uncovered cistern. By the daughter of the deceased it had been testified that the only persons present in the neighborhood at the time of the assault were herself and her mother; and that Tolliver was not in the neighborhood, and that if he had been, his presence would certainly have been discovered by her. To support the probable truth of the witness Tolliver, appears to have been the subsequent struggle. To support this witness, it was testified by an inmate of Dr. McCloy's household that Tolliver did deliver a load of wood at the Doctor's place about half an hour after the Croxton children gave the alarm and told of the cutting of the deceased. By another witness, who went to examine the ground, it was testified in behalf of the defense that horse tracks, within two feet of the open cistern, were found, and that they indicated an attempt to push the horse backwards in that direction. It was further shown in defense that the appellant's flight was in obedience to the advice of his relatives, and because of the excited condition of public opinion.

In rebuttal the State introduced D. K. Hinkle. He testified that shortly after the cutting of the deceased, he heard that the excuse relied upon was that the deceased was trying at the time to push the defendant and his horse into the cistern, and he examined the ground and found that the horse track nearest the cistern was nine feet distant. By two other witnesses it was testified that, on the evening or morning subsequent to the *habeas corpus* trial, the witness Larkin Tolliver told them in front of Frost's store in Richmond that he was so drunk at the time he was examined, he did not know what he said; that he did not see Croxton try to push the horse into the cistern; that Hill and Croxton were talking about money, Croxton standing near with his hand on the horse's neck or Hill's knee, when Hill struck Croxton with some kind of knife that he must have had in his hand all the time; that if he said on the *habeas corpus* trial that Croxton was trying to push Hill's horse into the cistern it was because the judge and lawyers plied him with so many questions, and he was so drunk, he did not know how to answer. Tolliver, on re-examination by the defense, denied the conversation and statements imputed to him by the two witnesses, as above set forth.

The motion for new trial was supported by the affidavits of two witnesses charging one of the jurors with statements affirming his conviction of the defendant's guilt, before he went upon the jury. These affidavits were met with that of the impugned juror, qualifying the statements imputed to him, and affirming his entire want of prejudice or opinion when he went upon the jury.

Jones & Garnett filed an able brief and argument for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was tried and convicted of the murder of W. R. Croxton, the jury finding him guilty of murder in the second degree, and fixing his punishment at confinement in the penitentiary for the term of five years.

We are informed by bill of exceptions that eight jurors were accepted and sworn to try the case, and that one Zack Cash (one of the eight) being informed that there was sickness in his family, the court, upon its own motion, and without first having the consent of the defendant or his counsel (the defendant however not objecting), discharged said Cash from serving as a juror in the case. It is true that the jury was not complete, but, in forming a jury in a capital case, each venireman is tested, and if accepted by both parties is sworn to try the case.

The learned judge appends, in explanation, the following: "The above is allowed, with the following remark or explanation, that up to the time Zack Cash was excused only eight jurors had been elected, and up to that time the defendant had exhausted only six of his challenges. That, after a jury of twelve had been obtained and before whom this case was tried, the defendant had nine challenges left." The first part of this explanation assumes that until the panel is full, the judge has the right, whether there be sufficient grounds or not, to excuse a juror. There is no pretence that a necessity existed such as would warrant the court in taking the juror from the list, nor the panel, if full. The action of the court is rested upon the fact that the jury was not full. The other ground is, if anything, less tenable than the first. That the defendant had not exhausted his peremptory challenges cannot in the least degree affect the question. He had a right to that juror — a right given to him by the law of the land. He may have had fifty peremptory challenges remaining, but we are at a loss to understand in what manner he could have exercised these challenges so as to restore to the eight the excused juror. Challenges are for the purpose of ridding the jury of obnoxious jurors, but can never replace one who has been wrongfully or rightfully excused. Though a juror may be without bias or opinion in the case, indeed honest and perfectly competent in every respect, he may possess qualities which would render him very acceptable to the State or defendant. This fact is looked to with great care in the formation of the jury in almost every case. Again, if the judge can, without necessity, excuse from the list of veniremen a juror, though not accepted and sworn, the law requiring a special *venire* and service of copy of the same would be to a great extent thwarted. We have said this much upon this subject in order to express our dissent from the principles announced in the explanations of the learned judge before whom this case was tried.

Quære: The defendant being present, and informed of the action of the court, and not objecting thereto, is he not estopped from complaining afterwards? Has he waived his right to the excused juror by not proclaiming, though not called upon, his objection to his discharge?

In the *Early* case a question somewhat similar was ably and exhaustively discussed by our present presiding judge. In that case the jury had separated. Upon convening of the court, the defendant Early was informed of the fact, and called upon by the court to say whether or not the trial should proceed,—the court saying that, if he desired, the case would be withdrawn from the jury and continued. The defendant Early refused to say anything, whereupon the court ordered the trial to proceed; to which Early excepted. In treating upon that point (the State insisting upon an estoppel) this court say: "Nor could the defendant be required to say whether he waived his rights in the premises. He was on trial for his life, and it was his privilege and right, if he so desired, by declining to say anything or refusing to waive any right, to place himself in an attitude to take advantage of any error committed in the proceedings calculated in any degree to prejudice his case." *Early* v. *State*, 1 Texas Ct. App. 248; 1 Bish. Crim. Proc. sec. 998.

It may be insisted that the defendant should show that an injury has been done him in this matter. This would be impossible, for the peculiar traits of character of the excused juror, which rendered him acceptable to the defendant, can never be shown, and if they could a very wide field of evidence would have to be entered and explored. The principles announced in the Early case and by Mr. Bishop would seem to apply to this case, but the cases are not precisely analogous. We have thrown out these remarks by way of caution, and not for the purpose of deciding the point involved, there being another error which will necessitate a reversal of the judgment.

The evidence in this case tends (whether strongly or otherwise does not affect the principle) to bring this case under the provisions of arts. 570 and 572 of the Penal Code. Under the first article, if the homicide was committed for the purpose of preventing murder, etc., it is not required of the slayer to resort to all other means for the prevention of the injury. But under art. 572, if the killing takes place in the protection of the person or property against any other unlawful and violent attack besides those mentioned in art. 570, all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed was in the very act of making such unlawful and violent attack. This is the rule, under the last article, applicable to a case in which the party *attacked* kills his adversary. If, however, the killing is done by another, he is not justified or excused, unless the life or person of the injured party is in peril by reason of such attack upon his property. If the unlawful and violent attack is made upon the person, a stranger has the right to kill under the same restrictions as the party attacked, and no others. But if the killing is to prevent an unlawful and violent attack upon property, to excuse a stranger the life or person of the party injured must be in peril. The record does not present for or require a discussion of the principles applicable to a case in which a stranger kills in behalf of another or his property, but we have thought it proper to make these suggestions.

The learned judge applied the law of art. 570 correctly, but when he attempts the application of art. 572 he blends the two articles. The charge is as follows: "Homicide is justifiable also in the protection of the person against any other unlawful and violent attack besides that of murder, but in such cases all other reasonable means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death or some serious bodily injury." * * * "A person who is thus unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. Thus if Croxton was, at the time he received the fatal blow, endeavoring to push this defendant into an open cistern, which, had he succeeded in doing, would have caused Hill's death, or some serious bodily injury, and if Hill believed it to be necessary in order to save his own life, or to prevent upon himself great bodily injury, to kill Croxton, and if he did kill him, he would be justified in law, provided he used or resorted to every reasonable means at his command in order to avoid this necessity."

If indeed the deceased was, at the time he received the fatal blow, endeavoring to push the defendant into a cistern and thereby cause his death, the defendant was not required to resort to every reasonable means at his command in order to avoid the necessity of killing; for the defendant could have been murdered or maimed as effectually by this means as any other. The court should have charged the jury, in effect, that if they believed from the evidence that it reasonably appeared by the words or acts of the deceased that it was the purpose and intent of the deceased to cast or push the defendant into the cistern and thereby murder or maim him, the defendant would be justified in killing the deceased; and in that case he would not be required to resort to all other means before killing. A charge, though not in all respects correct, indicating this principle, was requested and refused. In the charge of the court the rules of law contained in arts. 570 and 572 were not kept separate and distinct, the one from the other. Of this the defendant complained by bill and in his motion for a new trial. We are of the opinion that this error was fatal to the judgment of the court below. *Horbach* v. *State,* 43 Texas, 242; *Ainsworth* v. *State,* 8 Texas Ct. App. 532; *Kendall* v. *State,* 8 Texas Ct. App. 569, and authorities there cited.

The other questions raised are not likely to arise on another trial. For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

R. A. BLANDFORD v. THE STATE.

1. INTERNATIONAL EXTRADITION.—TREATIES between the United States and foreign nations are obligatory upon and cognizable by the tribunals of the several States as well as those of the Federal government. In the administration of the criminal law of this State, therefore, it is incumbent on the State courts to give effect to the provisions of the extradition treaty between the United States and Mexico when they are invoked by the accused and are applicable to his case.
2. SAME—EXTRADITION TREATY WITH MEXICO.—EMBEZZLEMENT of "public moneys" is one of the crimes for which reciprocal extradition is stipulated by the extradition treaty of Mexico with the United States; but funds of a private incorporation are not "public moneys," and the treaty repudiates any right to extradite an embezzler of private property or money.
3. SAME—CASE STATED.—Appellant was extradited to Texas from Mexico on a requisition charging him with theft (one of the offenses enumerated in the extradition treaty between the United States and Mexico), but prior to his extradition he was indicted in T. county, Texas, for embezzlement of private funds, which is an offense not enumerated in the treaty. Pleading to the jurisdiction of the court, he alleged that the offense for which he was placed on trial was not the offense for which he had been extradited nor one provided for in the said extradition treaty. *Held*, that the court below erred in sustaining a motion to strike out the plea, notwithstanding it is a plea unknown to our Code of Criminal Procedure. See the opinion *in extenso* for an exposition of the doctrine of international extradition and of the extradition treaty between the United States and Mexico.

APPEAL from the District Court of Travis. Tried below before J. H. BURTS, Esq., Special Judge.

On October 12, 1880, the grand jury of Travis county presented an indictment which charged that the appellant, on September 4, 1879, was the secretary of the Austin Home Building and Loan Association, an incorporated company, and as such was in possession of $5,100, currency of the United States and the property of said Association; and that he "did then and there, with intent to defraud, unlawfully and fraudulently embezzle and fraudulently misapply and convert said money to his, the said Blandford's, own use and benefit, without the consent of the said Austin Home Building and Loan Association or any member thereof; contrary to law," etc.

On November 26, 1880, the defendant filed under oath his plea to the jurisdiction of the court. By full and specific allegations this plea averred that on October 18, 1880, when the defendant was a resident of the Republic of Mexico and not of the State of Texas, and was quietly and lawfully pursuing his daily avocations and business in the Republic of Mexico, he was by force and arms arrested under and by virtue of an extradition warrant issued by one Gregorio Soto, extradition agent of the Bravo line between the State of Tamaulipas, in the Republic of Mexico, and the State of Texas; which extradition warrant was based on the requisition of one James M. Haynes, who was then and there county judge of the county of Cameron in the State of Texas, and an extradition agent, in and for said county, for all such purposes and with all such powers as were conferred on him by law and by a commission issued to him by his Excellency O. M. Roberts, Governor of the State of Texas, dated February 26, 1880, and which said requisition bears date on or about October 16, 1880. That, being so seized and arrested by virtue of said extradition warrant, he, the defendant, was forcibly removed from the Republic of Mexico and against his will transported into the county of Cameron and State of Texas, where he was delivered to the sheriff of that county, who transported him to Travis county and there he has been kept in jail. That the requisition on which he was extradited was based on the allegation that he was charged before a justice of the peace of Travis county with the theft of fifty dollars from the Austin Home Building and Loan Association, and his arrest and extradition were for the sole purpose of placing him on trial on said charge of theft; and he alleged his then readiness for trial upon that charge, but, on the contrary, the indictment to which this plea is interposed charges him with embezzlement of $5,100 from the said Association on September 4, 1879, and was presented by the grand jury on October 12, 1880. That the treaty between the United States and the Republic of Mexico imposed no obligation on the latter or its agents or authorities to issue an extradition warrant for the arrest of any one charged with embezzlement as aforesaid, and no extradition warrant would have issued upon such a charge. That defendant was not extradited to answer the charge of embezzlement preferred against him by the indictment in this case, and, at the time of his arrest and extradition, no charge was pending against him except that of theft on which he was extradited. That he has never been legally extradited to answer this indictment nor the accusation preferred by it, and his trial thereon would be in violation of the constitutions and laws of Texas and of the United States, the law of nations and the treaty between the United States and Mexico, and in bad faith to the Republic of Mexico, which has never delivered him up or consented to deliver him up to answer the charge alleged against him in said indictment.

The plea concluded with a prayer for such orders and process as would secure to him the benefit of all accessible documents relative to his extradition, and for his discharge without trial upon the indictment in this cause.

On December 3, 1880, the county attorney appeared in behalf of the State and moved to strike out the defendant's plea to the jurisdiction of the court, because the plea was a nullity, being unauthorized and prohibited by law. Exception for insufficiency was also taken to the plea, and a replication denying certain of the allegations made in it was filed. On the same day the defense moved the court to quash the indictment, because it set out no offense known to the laws of Texas.

The court below sustained the motion to strike out the defendant's plea to its jurisdiction, and overruled his motion to quash the indictment. The defense reserved exceptions to these orders of the court, and, a continuance being asked and refused, filed a plea of not guilty and a trial was had, which resulted in a verdict of conviction and the assessment of the punishment at a term of five years in the penitentiary. A new trial being refused, judgment final was entered against the defendant and he appealed.

It will be seen that the opinion of this court treats only of the matters set out and the questions raised in the plea to the jurisdiction of the court below. The evidence submitted to the jury had no relevancy to those matters. It was elaborate, consisting largely of entries in the books of the Austin Home Building and Loan Association, made therein by the defendant, its secretary, among whose duties was the receipt of money paid to the Association by its stockholders, and the payment of such money to the treasurer of the Association. Under the date of September 6, 1879, the defendant had interlined an entry to his own credit on the Ledger, viz.: "Sept. 6, 1879, To Sundries, Journal, Page 117, $5,100.00." No entries appeared in the Journal or elsewhere sustaining this credit on the Ledger, and witnesses for the State testified that they, acting in behalf of the Association, had examined the books, and, having called on the defendant for an explanation of the entry, he admitted its falsity and acknowledged that he had used the money. It appears that he offered certain land by way of restitution, and that his downfall was attributable to habits of intoxication.

Carleton & Morris, for the appellant. The court erred in sustaining the motion of the State to strike out appellant's plea to the jurisdiction of the court. It was the legal and constitutional right of the appellant to present his objections to the jurisdiction of the court to try the particular charge brought against him before he could be required to plead to the truth of the charge; and this right is not destroyed because the statute does not affirmatively declare that he *may* present a plea to the jurisdiction of the court. The State moved to strike out appellant's plea to the jurisdiction, on the ground that such plea was unauthorized by the laws of Texas, but in point of fact, the statutes of Texas in no place, in terms, inhibit the presentation of such plea. Sec. 19, art. 1, Constitution of Texas; arts. 522 and 525, Code Crim. Proc.

Under the terms of the treaty between the United States of America and the Republic of Mexico in relation to the extradition of criminals, the offense of embezzlement is not made an extraditable offense, and under the recognized rules of international law persons extradited and delivered up to be tried for an extraditable offense can only be tried for that offense and no other, and the jurisdiction which so acquires the possession of an extradited person acquires jurisdiction over such person only to the extent that they may try him for the offense for which he is extradited and no other.

On the ——— day of October, 1880, a complaint was filed in the office of Joseph Lee, justice of the peace in and for Travis county, Texas, charging this appellant, R. A. Blandford, with the theft of fifty dollars from the Austin Home Building and Loan Association. After the filing of said complaint against appellant, one James W. Haynes, then county judge of Cameron county, Texas, and extradition agent of the State of Texas, issued a requisition directed to one Gregorio Soto, extradition agent of the Bravo line in the Republic of Mexico, requesting him to deliver up the appellant, R. A. Blandford, to be tried for the offense of theft as set out in the complaint filed before Joseph Lee, justice of the peace of Travis county, Texas, said requisition being dated on or about October 16, 1880. The said Gregorio Soto did issue his warrant of arrest and did, on the eighteenth day of October, 1880, cause the said Blandford to be arrested in the city of Matamoras, in the Republic of Mexico, and did have him to be delivered, by virtue of said requisition of Haynes, to one Scanlan, sheriff of Cameron county, Texas, by whom he, said Blandford, was transported to Austin, Travis county, Texas, and delivered to Dennis Corwin, sheriff of Travis county, Texas. Before the arrest of said Blandford, to wit: on the twelfth day of October, 1880, the grand jury of Travis county, Texas, found an indictment against said Blandford, not for *theft of fifty dollars*, but for *embezzlement* of the sum of *fifty-one hundred dollars*, and to this last charge appellant, Blandford, was called upon to answer in said District Court of Travis county. He filed his plea to the jurisdiction, setting up all above facts, which plea was stricken out, and he forced to trial without having it passed upon. Treaty between United States and Mexico, dated December 11, 1861, on pages 579 to 580 of Treaties and Conventions between the United States and other powers; U. S. Statutes at Large, Vol. 12, p. 1199; article 9 of treaty between United States and Great Britain, dated August 9, 1842, on page 374 of "Treaties and Conventions between the United States and other powers;" *Ham* v. *State*, 4 Texas Ct. App. 662; *Commonwealth* v. *Hawes*, 13 Bush, 697; 26 American Reports, 242; Noyes' case, U. S. District Court of New Jersey, reported in Albany Law Journal, 409, Vol. 16; W. B. Lawrence on Extradition, in Albany Law Journal, 405, Vol. 14, p. 85; Spear on Extradition, 200, Albany Law Journal, Vol. 16, pp. 200 and 380.

II. The court erred in overruling appellant's motion to quash the indictment filed against him in this cause. An indictment charging embezzlement from any incorporated company or institution must affirmatively allege that the person embezzling was either an officer, agent, clerk, or attorney at law, or attorney in fact; and without such allegation no offense is properly or legally charged, nor can such allegation be supplied by the use of any other word which the pleader may deem synonymous.

The indictment filed in this cause does not charge that the appellant Blandford was an "officer" of the Austin Building and Loan Association, but alleges that "R. A. Blandford * * * was then and there the secretary of the Austin Home Building and Loan Association," etc., * * "by virtue of his position and office as secretary of said Austin Home Building and Loan Association," etc.; but does nowhere in plain and distinct terms allege that he was an officer of said Association, which it is alleged in said indictment is an incorporated company. Penal Code, art. 786; Webster's Dictionary, definition "Secretary;" Worcester's Dictionary, definition "Secretary;" *Webb* v. *State*, 8 Texas Ct. App. 310; *The People* v. *Allen*, 5 Denio, 76.

Horace Chilton, Assistant Attorney General, for the State.

I. The plea to the jurisdiction was unauthorized, and therefore was properly stricken out.

The Code of Criminal Procedure (art. 522) prescribes the pleas which defendants are permitted to interpose, and, to shut out misconstruction, declares that those enumerated are the only pleadings on the part of defendants.

The second subdivision of that article, if there was no further statutory limitation of its meaning, might very well be held to include a plea such as the one now under consideration, but its terms are expounded by art. 525, in which the "special pleas" of defendants are explained to mean those of former conviction and former acquittal.

II. But, independent of the formal objections to this plea, it was bad in substance.

The true rules governing international extradition, directly bearing upon the question here involved, cannot be considered as settled, either in this country or England. The conflict, however, has been, according to my information, as to the right of a *foreign government* to insist upon the return of a delivered fugitive, after he ceases to be held for an extraditable offense. I think the American view of the subject may be stated thus:

When a fugitive has been demanded and received by the United States, in good faith and upon a real prosecution for an extraditable offense, his relation to other prosecutions, after he is brought within the territory and dominion of this country, is precisely the same as that of other persons found in our jurisdiction, and he is subject to arrest and trial, just as if he had never fled. *Adriance* v. *Lagrave,* 59 N. Y. 112.

If there be any qualification to the authority of the government against whose laws one of its own subjects has offended, but whose surrender has been secured upon another accusation, it springs from treaty regulations, and only the parties to the treaty — to wit: the sovereigns making it,— can be heard to complain of its infringement, or to assert rights thereunder. *U. S.* v. *Lawrence,* 13 Blatchf. 295; *U. S.* v. *Caldwell,* 8 Blatchf. 131.

These decisions treat the question under discussion as one of diplomacy, and not as a right of any particular criminal who may be placed on trial. As illustrative of this doctrine, I quote from Bishop, on an analogous case:

"A foreign power cannot carry away a fugitive from its justice found within our territory, yet the fugitive himself, arriving home, could not there so take advantage of the unauthorized proceeding as to have the prosecution against him dismissed."

"Embezzlement" is not the defined name of any offense in the laws of Texas. A party indicted for theft may be convicted of embezzlement. Penal Code, art. 771 *et seq.*

III. The indictment sufficiently charged that Blandford was an officer of the Building Association.

A. It charges that he was the secretary.

B. That he came into *possession of the money by virtue* of his position and office as secretary.

C. That the Building Association was an incorporated company.

The court judicially knows that a *secretary* is an officer of a private corporation. The law so makes it. Rev. Statutes, art. 580.

HURT, J. Blandford was extradited from the Republic of Mexico upon a charge of theft. Before the arrest of the appellant in Mexico under and by virtue of the extradition papers, the grand jury of Travis county presented in the District Court a bill of indictment against him for the embezzlement of fifty-one hundred dollars. He was placed upon trial upon this bill charging him with embezzlement; to which he pleaded in substance, that the court, by reason of the fact that he had not been extradited for this offense, had no right to compel him to answer thereto. This plea was very full, setting out not only the facts clearly and distinctly, but the treaty between the Mexican and United States governments.

Upon motion of the State this plea was stricken out, and the defendant was forced to trial upon the indictment for embezzlement. He was found guilty, and his punishment was assessed at confinement in the penitentiary for the term of five years. Judgment being entered on the verdict, defendant appeals for relief to this court.

The correctness of the action of the court below in sustaining the motion of the State to strike out the plea depends upon what constitutes a true construction of articles first and third of the treaty between the Republic of Mexico and the United States, dated December 11th, 1861, and the proper decision of the question as to how far the judicial tribunals of the Federal and State governments are required to take cognizance of and give effect to treaty stipulations between the foreign and home governments.

Although it is stated by Story and Kent that under the Law of Nations sovereign states are bound to deliver up persons charged with or convicted of crimes committed in the other country upon demand, this doctrine never obtained permanently in the United States. With us the doctrine has long prevailed, that the foreign government has no right to demand the surrender of a violator of its laws, unless under and by virtue of treaty stipulations. Lawrence's Wheaton on International Law, p. 233, and authorities cited; Op. of Att'y Gen'l, vol. 6, p. 431. If, then, this right of one government to demand and receive from another the custody of an offender who has sought asylum upon the soil depends upon the existence of treaty stipulations between these governments, it follows that this right to demand, receive and punish must be measured and restricted by the provisions, either expressed or implied, of the treaty. This leads us to a discussion of what constitutes a true construction of articles 1 and 3 of the treaty between Mexico and the United States.

Art. 1. "It is agreed that the contracting parties shall, on requisition made in their name through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in art. 3d of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other: *Provided*, that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial, if the crime had been there committed."

Art. 3. "Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories or accomplices, to wit: Murder (including assassination, parricide, infanticide, and poisoning); assault with intent to commit murder; mutilation; piracy; assault; rape; kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the passing or making or knowingly passing or putting in circulation counterfeit coin or bank notes, or other paper current as money, with intent to defraud any person or persons; the introduction or making of instruments for the fabrication of counterfeit coin or bank notes or other paper current as money; embezzlement of public moneys; robbery, defining the same to be the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear; burglary, defining the same to be breaking and entering into the house of another with intent to commit felony; and the crime of larceny of cattle, or other goods and chattels of the value of twenty-five dollars or more, when the same is committed within the frontier states or territories of the contracting parties."

It is seen that the treaty enumerates eleven well defined crimes for which a party may be extradited, and stipulates that the party shall be delivered up to justice who is accused of one of the enumerated crimes, provided that this shall be done *only* when the fact of the commission of the crime shall be so *established* as that the laws of the country in which the fugitive shall be found *would justify his apprehension and commitment for trial if the crime had been there committed.* Why this specific enumeration of the crimes,—this proviso? Does not this enumeration evidently exclude crimes not named therein? If not, why enumerate? If the maxim "*expressio unius est exclusio alterius*" does not apply here, it can never be applied to any act either of Congress or the State Legislatures. It would be a useless, antiquated maxim and should be expunged from legal literature. To hold that it has no application in this treaty would render treaties a snare and a delusion, a farce and a solemn fraud. This treaty negatives, by imperative necessity as patent as that there is life in nature, the right to extradite only for crimes named in the treaty, and not then until after an examination into the charge by the authorities of the government upon which the demand is made,—the charge named in the treaty or one of them and contained in the requisition. Why stipulate in solemn compact that the government upon whom the demand is made shall have the right to examine into the charge, and, if a *prima facie* case is not shown, to refuse to surrender, if after being extradited the party extradited can be forced to answer to a charge neither named in the treaty nor examined by the authorities of the government making the surrender? In exact and unequivocal language the treaty sets out the precise purpose for which the fugitive is to be surrendered, and negatives by implication as strong and conclusive as a direct and positive negation that the person surrendered may be tried for offense different from that for which he was extradited under the stipulations of the contract made between the high contracting parties. The treaty names embezzlement of public funds. The indictment in this case is for the embezzlement of private funds. But be this as it may, the principle would not be affected if the funds were public. Not having been extradited for that offense, the party could not be placed on trial therefor. As stated by Chief Justice Lindsay in *Commonwealth* v. *Hawes:* "It would present a remarkable state of case to have one government saying in substance to another,—you cannot demand the surrender of a person charged with embezzlement. My judges or other magistrates have no right or authority upon such a demand either to apprehend the person so accused, or to inquire into the evidences of his criminality; and if they should assume to do so, and should find the evidence sufficient to sustain the charge, the proper executive authority could not lawfully issue the warrant for his surrender. But you may obviate this defect in the treaty by reciting the demand upon the charge of forgery, and if you can make out a *prima facie* case against the fugitive you may take him into custody, and then, without a breach of faith, and without violating either the letter or spirit of our treaty, compel him to go to trial upon the indictment for the non-extraditable offense of embezzlement."

All civilized nations agree on one point, and that is that they will not deliver a fugitive to be tried for political offenses, and through great caution with a view to prevent this, the sixth article of the above treaty provides among other things that "the provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character." What supreme nonsense is this if the fugitive can be extradited for one crime and then placed on trial for another,— make a *prima facie* case of murder, extradite, and then try him for rebellion! Our conclusion is, that the party extradited must be tried, if tried at all, alone upon the charge upon which he was extradited, unless the judicial tribunals of this State have no right to take cognizance of, and give effect to treaty stipulations between our own and foreign governments. That the judiciary of this State not only has the right, but is sworn to take cognizance of and give effect to treaties, cannot be questioned. Section 2, article 6 of the Constitution declares that "this Constitution and the laws of the United States made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

With us, under our Constitution, a public treaty is not merely a compact or bargain to be enforced by the executive and legislative departments of the Federal government, but living laws, operating and binding the judiciary of this State, as much as the Federal and State Constitutions, or the acts of Congress or those of the State Legislature. It follows, therefore, that the judicial tribunals of this State are required to take cognizance of, and give effect to the treaties made by the Federal government with other nations, just as if they composed a part of our Criminal Code. Indeed, they stand, if made in pursuance of the Constitution, upon higher ground than our State Constitution or any act of the Legislature of this State; for, if there be a conflict, the Federal Constitution being supreme, all treaties made in pursuance thereof must of necessity be supreme. Hence in case of conflict State Constitutions and acts of the Legislature must yield. In our opinion, then, the judiciary of this State is bound to take notice of and enforce treaties, treating them as if they composed a part of our Code.

With other nations, treaties, being considered compacts, and not legislative acts, are to be carried into execution by the sovereign powers of the respective nations which are parties to the compact. This, however, is not the case in the United States, for by our Federal Constitution treaties are declared to be laws of the land. They are therefore to be regarded and enforced by the State judiciary as equivalent to acts of the Legislature, without the aid of legislative enactments. *Foster* v. *Neilson,* 2 Peters, 253, *per* Chief Justice Marshall. If the Federal Constitution, or a treaty, inhibits the doing of a certain thing, no legislative or executive action is required to authorize the courts to decline to override these limitations or restrictions, "for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith but to transgress the supreme law of the land."

In view of these principles of law, we hold then that it is the duty of the courts of the State to take cognizance of, construe, and give effect to the treaties of the Federal government made with other nations; and that under a proper construction of the treaty with Mexico, the defendant could not be legally called upon to answer any other crime save that for which he was extradited. *Com.* v. *Hawes,* Law of Extradition (Spear), 138; Burley's case (Spear), 161; *Ham* v. *State,* 4 Texas Ct. App. 645.

It is urged in the very able brief of the assistant attorney general that this plea to the jurisdiction is not known to our Code of Criminal Procedure, and that therefore the court below could not entertain it, and acted properly in striking it out. The plea to the jurisdiction, in our opinion, is inherent, and a defendant cannot be deprived of the right to interpose it. There are but four pleas which can be interposed by the defendant, under the Code Crim. Proc., to wit: pleas of guilty, not guilty, former conviction and former acquittal. But under the Bill of Rights "no person for the same offense shall be twice put in jeopardy of life or limb." Suppose a defendant desired to plead former jeopardy, where in the Code of Criminal Procedure is this plea provided for? By this sacred Bill of Rights he is protected and shielded against being twice placed in jeopardy, but when he proposes to assert and shield himself with this weapon of defense, he is met with a silent Code, thus rendering inoperative and nugatory this inestimable right. Against this we protest, for we have seen that when the Constitution or treaties prohibit the doing of a certain thing, to authorize the courts to refuse to do the inhibited act it is not necessary to have a legislative enactment. With equal force does this principle apply to the inhibitions contained in the Bill of Rights.

It is apparent from the reasons above stated that the court below erred in striking out the defendant's plea. The judgment is reversed and the cause remanded.

Reversed and remanded.

MANNIE WILBANKS *v.* THE STATE.

CHARGE OF THE COURT is intrinsic error when it authorizes the jury arbitrarily to reject, or arbitrarily to receive and credit, the testimony of witnesses who testify before them. See this case for suggestion of this court with reference to charges to the jury upon the evidence.

APPEAL from the County Court of Johnson. Tried below before the Hon. W. J. EWING, County Judge.

The indictment charged the wilful killing of a gelding, the property of J. A. Callahan, on the 14th day of January, 1880. The jury found the appellant guilty and assessed his punishment at a fine of $100.

The State relied alone upon circumstantial evidence, but, as no question arising thereon is involved in the opinion, a statement of the facts is unnecessary. That clause of the charge of the court which is held objectionable reads as follows:

"4th. You are the exclusive judges of the weight of the testimony, and the credibility of the witnesses, and in so weighing and considering the testimony, the jury may believe a part and discard a part of what any witness may have sworn, or they may discredit and disregard the entire testimony of a witness if in their judgment all the other facts and circumstances in evidence before them induce such belief; and in case of a conflict of evidence the jury have the unquestioned right to give credit to the witnesses on one side in preference to the other; but in every case the jury should receive the law from the court alone, and be governed thereby.

Poindexter & Padelford, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was prosecuted to conviction on a charge of wilfully killing a gelding, the property of one Callahan, with intent to injure the owner. The State relied on circumstantial evidence alone for a conviction. The defense of *alibi* was omitted in the general charge of the court, but the omission was corrected by giving a special instruction at the request of the defendant's counsel. The general charge of the court, in the paragraph relating to the right of the jury to weigh the testimony given them, under the facts proved on the trial, we deem to be erroneous in that it permitted the jury arbitrarily to reject or receive and credit the testimony of the witnesses who had testified before them. The error we complain of is found in the fourth paragraph of the charge, in which the court, after having correctly informed the jury that they were the exclusive judges of the weight of the testimony and the credibility of the witnesses, proceeds to lay down rules by which they were to be governed, and which enabled them to cull the testimony against the defendant, and found a verdict upon it, and arbitrarily reject the testimony produced on behalf of the defendant.

It is preferable to give the jury these instructions substantially in the language of the Code of Procedure, article 728, as follows: "The jury in all cases are the exclusive judges of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or when the law directs that a certain degree of weight is to be attached to a certain species of evidence." Ordinarily and in cases like the present, the exceptions mentioned have no application and need not be embraced in the charge. Generally the law would be satisfied by giving the jury such instruction as is embraced in the first part of the article, omitting what follows after and including the word "except."

That portion of the charge which attempts to lay down rules for the guidance of the jury in forming a verdict was erroneous and certainly liable to mislead the jury to the prejudice of the defendant, and on this account the judgment will be reversed and the cause remanded.

Reversed and remanded.

JOHN RUSTON *v.* THE STATE.

THEFT OF ANIMALS — CHARGE OF THE COURT.—Purchase in good faith from one having possession, and without knowledge or reason to believe that the animals were stolen, is a valid defense, and, such purchase being an issue in the case, a charge is deficient that fails to enunciate the law applicable to such defense.

APPEAL from the District Court of De Witt. Tried below before the Hon. H. C. PLEASANTS.

Abe Bowen, W. H. Rice and the appellant were jointly indicted for the theft of two geldings, the property of B. and L. Miriam, in De Witt county, on the 25th day of August, 1879. A five years' term in the penitentiary was assessed against the appellant, who was alone on trial.

The sole defense was that the horses were traded for by Bowen with a man named Woods, and that the appellant merely assisted Rice in his efforts to sell one of the horses which was given to him by Bowen, his step-father. Bowen, who had been tried upon the same indictment and acquitted, testified to his trade with Woods, and exhibited a bill of sale signed by R. W. Woods, and witnessed by W. H. Rice and G. W. Ruston, the appellant's brother, and duly recorded. The appellant's subsequent connection with the horse was testified to by W. H. Rice.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. If we correctly apprehend the ground of the defense relied on at the trial below, it is that the appellant had purchased the animal alleged to have been stolen, from one Wood. This seems to have been the controlling, if not the only, issue presented and attempted to be proved. From a careful examination of the charge of the court, we are constrained to say that, whilst with a single exception it presented the law of the case in a clear, full and explicit enunciation of the law applicable to the facts proved, on this vital issue, the purchase of the property, the charge is deficient. If the fact be that the defendant purchased the animals in good faith, not knowing or having reasonable grounds to believe that they had been stolen, this would be a valid defense, and being the only issue tendered and attempted to be proved by the defendant, it should have have been clearly and pointedly submitted to the jury by the court.

Because of this defect in the charge as to the law of the case arising upon the proofs, the judgment must be reversed and the case remanded for a new trial. Other errors complained of are not considered, for the reason that such of them as are of seeming importance are not likely to arise on another trial.

Reversed and remanded.

ZIP MASSEY V. THE STATE.

1. CONFESSIONS made under arrest, though not voluntary or after warning, may be used in evidence to the extent that the accused made statement of facts and circumstances found to be true, and no further. Only so much of the confession is admissible as was indicative of verified and inculpatory disclosures.
2. SAME.—The other evidence showing that the stolen money was taken from a certain drawer, and the accused on producing the money having stated that he got it from that drawer, this declaration was admissible though made under arrest and without warning.

3. **EVIDENCE.**—Declarations of the accused and of a third party as to the collection by the former of a sum of money some months before the theft, were properly excluded as evidence for the defense; those of the third party as hearsay, and as proof competent only to be made by him upon the stand.
4. **PRACTICE — ORGANIZATION OF JURY.**—Though the court erred in refusing to permit the accused to further test a juror after the latter had, by his own answers, raised a doubt of his qualification, it was not such error as requires a reversal of the judgment when it appears that the accused relieved himself of the obnoxious juror by peremptory challenge, and suffered no prejudice.

APPEAL from the District Court of Camp. Tried below before the Hon. B. T. ESTES.

The charge in the indictment was the theft from J. C. Lindsay, on April 24, 1880, of $25, in two ten and one five-dollar notes. The trial resulted in a verdict of guilty, and a term of two years in the penitentiary was the punishment assessed.

J. C. Lindsay testified, for the State, that the appellant was in his employ as a servant or laborer on the 24th day of April, 1880. A few days before the date named, the witness had placed his pocket-book, containing $95 in paper money, in a table drawer in a room in his house, in Camp county. This drawer was usually kept locked and the key on the mantel-piece, or hung up in the room, and to this room the appellant had free access. On the day stated, the witness took his pocket-book from the drawer and discovered that two ten and one five-dollar bills had been abstracted. The appellant had left the witness a day or two before, and the witness immediately suspected him. He procured a warrant for his arrest and was deputized to execute it. He found the appellant in Mr. Gregory's store in the town of La Fayette, Upshur county, and called him out. He followed the witness into Dr. Grammar's drug-store, and there the witness told him he had lost some money, and the appellant denied having it. The witness then arrested the appellant, and the latter took two ten-dollar bills from his pocket and delivered them to the witness, and, in reply to the question of the witness, he stated that he got the money out of witness' table drawer. The witness was unable to say whether the bills abstracted from his drawer were Treasury or National Bank notes, but they were of a class in circulation and known to the witness as "greenback" bills. Two of the notes were of the value of ten dollars each, and one of the value of five dollars. The bills recovered from the appellant were similar in appearance to those taken from the defendant's drawer. He could not say that they were the same.

Cross-examined the witness stated that he had paid the appellant nothing for that month's service, when he left. At the time the money was lost, there were in witness' family his wife, sister-in-law, three children and a young white man, and there was also about the place another negro besides the appellant; all of whom had access to the room from which the money was taken. The witness was absent in his field during the day, but at the house at night. He thinks the drawer was locked after the money was put in it, and that the key was laid up or hung up in the room. The money was placed in the drawer on Tuesday and missed on the following Friday. On re-examination the witness said that, on being questioned, the appellant denied having applied to Dr. Grammar to change a ten-dollar bill.

George Danly testified, for the State, that near about the time of the arrest of the appellant he came to witness and gave him a five-dollar bill, asking him to get Ray Lindsay to change it, saying that he owed Mr. Lindsay $2.30, and if he asked change himself Lindsay would take that amount out of the bill. The witness got the bill changed as requested, and appellant gave him twenty-five cents of the change for his trouble.

Caleb Lindsay, a brother of the prosecuting witness, testified for the State that, about the time of the arrest of the appellant, he changed a five-dollar bill for George Danly, the last witness. The appellant did not owe the witness any sum of money.

Dr. Grammar testified, for the State, that on or about the day of the arrest of the appellant, he handed witness a ten-dollar bill in his drug store, asking change. The witness could not make the change and returned the bill. He was present when J. C. Lindsay arrested the appellant, and saw the latter, after his arrest, take two ten-dollar bills from his pocket and hand them to Mr. Lindsay. About the 25th day of December, 1879, the witness bought two loads of corn from the appellant, paying him therefor, at the rate of fifty or sixty cents a bushel, some eight or ten, or possibly as much as fourteen dollars. Since then he has bought nothing from, nor paid any money to, the appellant.

Jim Duncan testified, for the defense, that he was present when appellant was arrested by Mr. Lindsay. The latter told the witness to go to Gregory's store and bring the appellant to Grammar's drug store. He did so, and Lindsay arrested the appellant and charged him with theft of some money. The appellant denied the theft, and Lindsay ran his hand in his pocket as if to draw a pistol. Witness saw the appellant with money a month or two before, but could not say how much.

Tobe Swifford testified, for the defense, that he was present when appellant was arrested, and that Lindsay had a pistol in his hand when he made the arrest. A month or two before the arrest, the witness paid $20 to the appellant in money and an order on G. C. Hopkins. Of this, witness paid him $5 at the time, left $10 with Mr. Garrete for him, and gave him an order on Hopkins for $5, and subsequently saw the appellant with the money. The witness saw the appellant with money,—

he could not say how much,—about one month before Lindsay lost his. This money was in a pocket-book, folded. There may have been two bills, but the witness could not see their denomination.

G. C. Hopkins testified that, on an order from Tobe Swifford, he paid the defendant five dollars, but did not recollect whether he paid the order in money or in goods from his store. He saw the appellant sell his saddle and bridle for four or five dollars, a month or two before Lindsay lost his money.

Wm. Norman and Dick Wilson both testified to seeing appellant with greenback money about the time he left Joe Lindsay. Norman stated that this was some two or three months before Lindsay was said to have lost his money.

A. Teel testified that he knew the appellant's reputation for honesty, and that it was good.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

White, P. J. At the time the confessions were made, the evidence shows not only that defendant was under arrest, but also tends strongly to show that they may have been procured by means of intimidation. Confessions made under arrest, unless voluntary and after warning, may be used to the extent that the party made statement of facts and circumstances found to be true, and no further. Beyond the facts stated and as far as they furnish information, other portions of the confession would not be admissible evidence. *Davis* v. *State*, 8 Texas Ct. App. 510.

We are not prepared to say that, as far as shown by bill of exceptions No 1, the court exceeded the rule in the admission of defendant's statements,—the defendant having produced the money, stating that he got it out of witness' drawer, from which the other evidence showed it was taken.

Nor did the court err in refusing to permit defendant to prove his own declarations, and the declarations of a third party, as to the collection of a sum of money by defendant some months before. This third party should have been produced to prove the fact. In the manner sought, the evidence was clearly hearsay.

The court clearly erred in refusing to allow defendant's counsel to interrogate the jurors who in testing their qualifications had answered that "they hardly knew whether they had formed an opinion (as to defendant's guilt) such as would influence their verdict." Whilst it is true the court is made the judge, after proper examination, of the qualifications of jurors (Code Crim. Proc. art. 614), still this does not deprive a party of his right, where the juror's qualification is in doubt from his own answers, to have him further examined either by the court or under its direction. Code Crim. Proc. art. 636, subdivision 13. This right of examination exists in other as well as capital felonies. Code Crim. Proc. art. 650. Notwithstanding this error, however, inasmuch as the bill of exceptions shows that defendant did rid himself of the objectionable jurors by peremptory challenge, we cannot see how the ruling of the court, though erroneous, could in any manner have inured to his injury.

We see no error in the record of sufficient importance to call for a reversal of the judgment, and it is therefore affirmed.

Affirmed.

THOMAS P. SARTAIN *v.* THE STATE.

SENTENCE — TERM OF IMPRISONMENT — CASE STATED.— Upon a conviction for bigamy wherein the punishment assessed was one hour's confinement in the penitentiary, sentence was pronounced against the accused. After one hour had expired, the accused, never having been incarcerated in the penitentiary, applied for his discharge under a writ of *habeas corpus*, claiming that he was entitled thereto by virtue of art. 825, Code Crim. Proc., which provides that the term of imprisonment in a conviction for a felony shall commence from the time of sentence. *Held*, that notwithstanding the provision of the article referred to, the term of imprisonment of the accused could not commence until he is actually delivered to the penitentiary authorities, and placed in confinement inside of the penitentiary walls.

APPEAL from the District Court of Grayson. Tried below before the Hon. JOSEPH BLEDSOE.

No brief for the appellant.

J. H. McLeary, Attorney General, for the State.

WHITE, P. J. Appellant was convicted upon a charge of bigamy, and his punishment was assessed by verdict and judgment at one hour's imprisonment in the State penitentiary. Sentence was pronounced upon him in accordance with the judgment. An hour or more after sentence was pronounced, he applied to the district judge for a discharge upon writ of *habeas corpus*,— claiming his right to discharge by virtue of the latter clause of art. 825, Code Crim. Proc. (act Feb. 21, 1879), which provides that "the term" (of imprisonment) after conviction and sentence in a felony case "shall commence from the time of sentence." Upon hearing of the writ the district judge refused to discharge, but remanded appellant to the custody of the sheriff, to be kept until he could be conveyed by the legally constituted authorities to the penitentiary, there to be confined in compliance with the judgment. From this order and judgment he appeals here.

The question is, does the statute invoked apply to a case of this kind, and was the defendant entitled to be discharged though the judgment and sentence had never been executed upon him, simply by virtue of the fact that his term of imprisonment had expired if it should be counted from the date of the sentence? In other words, it is insisted that a term of imprisonment can expire before there has ever been any imprisonment, and that a judgment can be executed without in fact ever having been executed. To state the proposition is to manifest its absurdity, and in passing the act referred to (art. 825) the Legislature could never have intended such an absurdity, or, rather, could never have intended to defeat the very object of the penal law by depriving it of its power to enforce its judgments. One of the very objects of the Code of Criminal Procedure is declared to be "the certain execution of the sentence of the law when declared." Code Crim. Proc. art. 1, subdiv. 6.

In felony cases "a final judgment is the declaration of the court entered of record, showing" among other things "that the defendant be punished as it has been determined by the jury in cases where they have the right to determine the amount, or the duration and the place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict." Code Crim. Proc. art. 791, subdiv. 10.

Art. 792. "A sentence is the order of the court made in presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law."

Art. 820. "Immediately after final sentence shall have been pronounced the convict *shall be conveyed to the penitentiary*," etc. "The sheriff shall deliver the convict

* * * to the superintendent of the penitentiary." Art. 824. Felonies less than capital are punished by *imprisonment in the penitentiary.* Penal Code, art. 54. The punishment for bigamy is "*by imprisonment in the penitentiary* for a term not exceeding three years." Penal Code, art. 324.

In the very nature of things there can be no incarceration in the penitentiary without an actual imprisonment within its walls. But it is insisted that there is neither exception to the operation nor ambiguity in the language used in the statute invoked,—the language being "the term shall commence from the time of sentence, or in case of appeal from the time of the affirmance of the sentence by the Court of Appeals." Code Crim. Proc. art. 825. "It will be found to be an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of the statute, taken and compared together." * * * And "where the intention of the Legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one. 'It cannot be contended,' says Lord Kenyon, 'that a subsequent act of Parliament will not control the provisions of a prior statute if it were intended to have that operation; but there are several cases in the books to show that where the intention of the Legislature was apparent that the subsequent act should not have such an operation, then, even though the words of such statute taken strictly and grammatically would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such construction.'" Potter's Dwarris, p. 110.

"Courts are not confined to the literal meaning of the words employed, in the construction of statutes, but, as was said in *Burgett* v. *Burgett*, 10 Reports, 221, the intention of the law-makers may be collected from the cause or necessity of the act; and statutes are sometimes contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. (4 Bac. title Statute, 1, secs. 38, 45, 50.) Every statute should be construed with reference to its object, and the will of the law-makers is best promoted by such a construction as secures that object and excludes every other." *Castner* v. *Walrod*, 83 Ill. 171; *Walker* v. *State*, 7 Texas Ct. App. 245.

Ch. J. Chase in Cæsar Griffin's case says: "On the other hand a construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither or neither in so great degree, unless the terms of the instrument absolutely require such preference." Chase's Decisions, 364. And in *Missouri Mutual Life Ins. Co.* v. *King*, 44 Mo. 283, it was held,—"Generally where words used in a statute are clear and unambiguous there is no room left for construction; but where it is perceived that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and made to control the strict letter."

Now, applying these principles, it certainly never could have been intended by the Legislature to exempt entirely from punishment and imprisonment in the penitentiary any citizen who, after having violated the law, was fairly tried and condemned, and sentenced to such punishment for his crime. It could never have been intended that a party condemned to the penitentiary could claim that he had expiated his imprisonment when in fact he had never been imprisoned. It could not have been intended that all previous laws pertaining to the conviction, or rather the punishment, of convicted felons should be repealed.

The obvious construction of art. 825 is simply this,—that when a party is condemned to the penitentiary for any term of months or years he must be imprisoned in the penitentiary, but, after he has reached and been actually confined in said penitentiary, the term of his imprisonment may be estimated to begin from the date of sentence.

To hold otherwise would be to relieve felons, such as appellant in this case, to a certain extent from the disgrace and the disabilities of actual imprisonment in the penitentiary, which is as much a part and parcel of the punishment as the term of imprisonment.

We see no error in the judgment, and it is affirmed.

Affirmed.

Ex Parte Henry O. Rogers.

1. Forgery — Indictment — Variance.— When an indictment for forgery purports to set out the forged instrument according to its tenor, and in *hæc verba*, any variance as to the words of the instrument, unless the variance be mere fault of spelling, is fatal to the indictment.
2. Same — Evidence.— A distinct variance between the attestation clause of a deed alleged to be forged and the instrument as described *hæc verba* in the indictment, disqualifies it as evidence.
3. Same — Practice.— Before the State had concluded its evidence, and after the motion of the accused to suppress the alleged forged instrument as evidence, the court permitted the counsel for the State to dismiss the prosecution under the indictment, and held the accused in custody to enable the State's counsel to file a complaint sufficient to charge the accused with the offense attempted to be set out in the indictment. *Held*, that the court did not err.
4. Same — Former Jeopardy obtains when it appears that the former trial was for an offense identified by the proof with the one on trial, and the usual test is whether the evidence necessary to support the pending prosecution would have supported the former one. See this case, wherein the plea is not well taken.
5. Same — Jurisdiction.— When it appears that a conspiracy to fabri-

cate titles to lands in this State was entered into in Texas, and that one or more of the overt acts was perpetrated in Texas, the courts of this State have jurisdiction, independent of the act of 1876, to try the case, though it be shown that the actual fabrication was committed in another State by an agent or co-conspirator of the defendant.

6. Same.—Independent of general principles, the statutes in force prior to the act of 1876 conferred such jurisdiction upon the courts of this State. See the opinion *in extenso* on the subject.

Appeal from the District Court of Travis. Tried below before the Hon. A. S. Walker.

The indictment charged the forgery of a deed of conveyance purporting to be the act of one Edward Gritten, transferring to James Leland Hall the legal title of the said Gritten to a certain league of land, situated in Travis county, Texas. The alleged fraudulent deed bore date January 25th, 1849. The indictment was filed in the District Court of Travis county, June 11th, 1878, and charged the forgery to have been committed August 8th, 1878. H. M. Peck was charged in the same indictment with the appellant, as a party to the same offense.

At the January term, 1881, of the Travis county District Court, this appellant was put upon his trial. After the State had introduced a part of its proof, the alleged forged instrument was offered in evidence. Its reception was objected to by the appellant upon the ground that there was a variance in the witness-clause as it appeared on the instrument and as it was set out in the indictment. The indictment described the witness-clause as being in the words: "In presence of John Gardner, Henry Miller," whereas it appeared upon the instrument itself "sealed and delivered in presence of John Gardner, Henry Miller." The court sustained the objection, and upon motion permitted the State's counsel to dismiss the proceedings under the indictment, and ordered the appellant into the custody of the sheriff for an hour or two in order to enable the State's counsel to present a sufficient complaint to charge the appellant with the forgery of the deed. This being done, and a warrant issuing thereunder, the appellant sued out a writ of *habeas corpus*, claiming upon the hearing that he had been placed in jeopardy by reason of the previous proceedings, and was therefore entitled to his discharge. It was urged also that the evidence, if it showed that the paper was in fact forged, proved that it was forged in the city of Chicago, Ill., prior to the act of 1876 providing for the detection and punishment of forgers of land titles, and that therefore the courts of this State had no jurisdiction over the case. The court refused to discharge the appellant, and he appealed.

The opinion sufficiently indicates the character of the evidence upon the questions involved. Counsel for the appellant filed a motion for a rehearing, and fortified it by a brief and argument of great force and research; but the motion was overruled.

Bethel Coopwood and *J. H. Stewart*, for the appellant.

1. Falsely making a deed in another State was not made penal by the plain import of the words of the law of the State in force in 1874, when, it is alleged, the one in question was made, and, there being no express words requiring it, the statute then in force will never be interpreted to embrace forgery committed beyond the territorial limits of the State; the power to define and punish such offenses, committed within its limits, being reserved to each State respectively; and a want of territorial jurisdiction is fatal at any stage of the cause. The legislative construction is that the law as it was aforetime did not embrace extra-territorial acts. Pas. Dig. art. 1605–1611; *Rogers* v. *State*, 8 Texas Ct. App. 400; 1 Bish. Cr. L. 80–189; U. S. Const. X Amendment; *Collens* v. *State*, 6 Texas Ct. App. 647; Revised Penal Code, art. 454; *People*

v. *Tyler*, 7 Mich. 222; *Com.* v. *Green*, 17 Mass. 540; *Adams* v. *People*, 1 Comst. (N. Y.) 179; *Graham* v. *Mansergh*, 22 Vt. 54; *Bromley* v. *People*, 7 Mich. 447.

2. "The act, to be criminal, must be alleged to be an offense against the sovereignty of the government. This is the very essence of crime punishable by human law." *State* v. *Carter*, 3 Dutcher (N. J.), 499.

3. The constitutional requisite that it be "against the peace and dignity of the State" is descriptive of the circumstances under which it is punishable, and no one can be held liable unless he comes within all the particulars of the offense described. Const. of Texas, art. 5, sec. 12; *People* v. *Tayler*, 7 Mich. 210.

4. The Legislature of a State "cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done." Cooley's Const. Lim. (4th ed.) 155.

5. If the forgery was committed in the State of Illinois the *corpus delicti* is there, and there the forgers are punishable, or nowhere; and it is immaterial that the lands intended to be conveyed by the forged deed were not situate within the State. *People* v. *Flanders*, 18 Johns. 166.

6. "To forge is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will" (3 Inst. 169); and where the blow is struck,—the instrument falsely made,—the fact constituting the offense committed,—there is the *corpus delicti*, and the fact is "against the peace and dignity" of the sovereignty having legislative and judicial jurisdiction over that place. Indeed it is difficult to see how a fact committed in another State can be brought within the meaning of any plain and intelligible words of our Code, or claimed to be "against the peace and dignity of this State."

7. Defining and affixing a penalty for conspiracy,

entered into in this State, to commit an offense beyond its limits, without defining or making penal any fact committed beyond its territorial limits, excludes the right to punish the latter in this State. Pas. Dig. art. 2453.

8. Forgery, as defined by the Code in 1874, was a substantive act, and only those who made some part or the whole of the false instrument, or participated in the unlawful act of making it, were guilty of the offense; and so the Legislature, by the act of 1876, seems to have construed the law as it was aforetime. *Expressio unius est exclusio alterius.*

9. It is now well settled by authority and in reason "that where a party is once placed upon his trial for a public offense, involving life or liberty, with a competent jury duly impaneled, sworn and charged with the case, he has then reached and is placed in jeopardy, from a repetition of which, upon the same indictment, or any other for the same offense, the constitutional shield forever protects him; and after the jeopardy has once so attached a discharge of the jury, without the consent of the defendant, before they have rendered a verdict, is equivalent to a verdict of acquittal;" and the case at bar not coming within any of the exceptions to, but being fully and completely embraced by, this general rule, the appellant was, in law, acquitted of the charge against him by the proceedings had upon the indictment. *Vestal* v. *State*, 3 Texas Ct. App. 652; *Parchman* v. *State*, 2 Texas Ct. App. 238; *U. S.* v. *Shoemaker*, 2 McLean, 114; Bish. Cr. L. 856; *The Com.* v. *Tuck*, 20 Pick. 364; *Newsom* v. *State*, 2 Kelly, 60; *Reynolds* v. *State*, 3 Kelly, 53; *State* v. *Redmond*, 17 Iowa, 333; *State* v. *Walker*, 26 Indiana, 352; *Klock* v. *The People*, 2 Parker, 685; *Lee* v. *State*, 26 Ark. 262; *O'Brian* v. *The Com.* 9 Bush (Ky.), 333.

10. If the decision of the court excluding the evidence upon the trial was right, it was simply a misapprehension of the rules of evidence by the prosecution, and the re-

sult was the want of a proper preparation for trial, and this without fault on part of the accused, and that the ruling of the court was erroneous does not alter the principle; nor can the State, upon an adverse decision, arrest the trial with a view to a more favorable decision at another term. *Klock* v. *The People*, 2 Parker, 658 (N. Y. Cr. C.).

11. The indictment and complaint charge the same identical act, so combined and charged as to constitute the same legal offense or crime; and if there is diversity of circumstances not necessary ingredients in the crime, still the offenses are to be regarded as the same. *The Com.* v. *Cunningham*, 13 Mass. 245.

12. The charge was forging a deed which was a complete instrument, without the clause introducing and purporting to be the act of the subscribing witnesses; such clause formed no part of the deed, and, not being alleged to be forged, may or may not be the act of the persons whose names were subscribed to it. It constitutes no material variance, though not set forth in the indictment. *Miller* v. *The People*, 52 N. Y. 305; *Hess* v. *State*, 5 Ohio, 9; *The Com.* v. *Ward*, 2 Mass. 397.

13. It is not the signature of the witness, but the signing, sealing and delivery by the grantor, that constitutes the instrument a deed. Wharton's Am. Cr. L. 598; *State* v. *Ballard*, 2 Murphy, 186; *Menley* v. *Zeigler*, 23 Texas, 93.

14. The legal identity of the two offenses is to be found in the answer to this question: Could the prisoner, upon any evidence that might have been produced, have been convicted upon the first indictment of the offense that is charged in the second? *The Com.* v. *Bakeman*, 105 Mass. 59; *Parchman* v. *State*, 2 Texas Ct. App. 240.

15. Appellant being held upon a complaint, and not indicted, this court must hear and determine the cause upon the law and the facts arising upon the record, and thereupon do substantial justice to the appellant. Revised Code Crim. Proc. arts. 884 and 174.

Horace Chilton, Assistant Attorney General, and *H. M. Holmes*, for the State.

White, P. J. By bill of indictment, presented in the District Court of Travis county, on the 11th day of June, 1878, the appellant and one H. M. Peck were charged with the forgery of a certain instrument in writing, purporting to be the deed of one Edward Gritten, executed on the 25th day of January, 1849, and to convey to one James Leland Hall, by bargain and sale, the title of the said Edward Gritten, in and to a certain league and labor of land situated in Travis county, Texas. The indictment purports to set out the forged instrument according to its tenor and in *hæc verba*, and not simply according to its purport; the instrument concluding with the signature of "Edward Gritten, [seal]" on the right hand side of the page, and the words "In the presence of John Gardner, Henry Miller," on the left.

The case against this appellant being called in the District Court on the 5th day of March, 1881, he withdrew a motion previously submitted to set aside the indictment, and presented his motion to quash, which, upon hearing, was overruled by the court, the appellant reserving exception, and the case was set for final trial on the following 14th day of the same month. When the case was called on the said 14th day of March, the appellant being in court in person and by attorney, a jury was legally impaneled and sworn, and the indictment read; to which the appellant declined to plead, whereupon the court entered the plea of "not guilty" for him, and ordered the trial to proceed, and the appellant excepted. After having introduced, in part, the testimony on behalf of the State, the county attorney offered in evidence the instrument alleged to have been forged, and upon which the prosecution was based. The appellant objected to its reception as evidence, upon the ground that upon its face it disclosed a fatal variance with the instrument as set out in the indictment, in this, that in the instrument as described in the indictment the words "In presence of John Gardner, Henry Miller" appeared, whereas in the instrument offered in evidence the words "*sealed and delivered* in presence of John Gardner, Henry Miller" appeared. The court sustained the objection, and held the proffered instrument inadmissible as evidence. Thereupon the county attorney filed his motion, asking permission to dismiss the case, and that the appellant be held for a reasonable time in order to enable him to file a complaint charging the appellant with the same offense. The motion was granted, and time allowed; to which action of the court, and the withdrawal of the case from the jury, the appellant excepted.

On the same day the county attorney filed a complaint against the appellant, charging him with the same offense, upon which a warrant issued, and the appellant was held. Appellant sued out a writ of *habeas corpus* on the same day, upon the hearing of which he was remanded to the custody of the sheriff in default of bail. From this judgment he prosecutes this appeal, claiming that he should have been released, (1), because he had once been put in jeopardy under the same identical charge, and, (2), because, admitting even that the instrument was a forgery, the evidence showed that the forgery was perpetrated in Chicago, Ill., and not in Texas, and was therefore not an offense cognizable in the courts of this State.

The proper adjudication of this appeal involves the consideration of the following questions:

1. The indictment purporting to set out the instrument alleged to have been forged, according to its tenor, and in *hæc verba*, was the variance in the instrument tendered in evidence fatal? And if so, would the proof, insufficient to sustain the two prosecutions, render a second trial for

the same offense the subjection of the appellant for a second time to jeopardy?

2. Have the courts of this State, under the laws in force upon the subject prior to the act of 1876, jurisdiction to try parties accused of the forgery of titles to lands in this State, when the forged instrument itself was actually executed in another State?

Responding to the first proposition stated, it must be said that Mr. Wharton in his work on Criminal Evidence lays down the rule which obtains in criminal pleading in this State, that "when an indictment undertakes to set forth, as in forgery or libel, a document according to its tenor, * * * then, any variance as to the words of the document, unless such variance be mere fault of spelling, is fatal." (Sec. 114, and authorities cited.) The conclusion of the charging part of the indictment in this case, which immediately precedes the copy of the instrument as set out, is in these words: "The said false instrument of writing being in words and figures as follows, to wit:"

Whether or not an indictment that merely sets out the purport of the instrument would, in this State, suffice to charge the accused and put him on his defense, is a question that calls for no opinion in this case. Certain it is, that, if such an indictment were sufficient to charge forgery, and this indictment were such an one, no question of the admissibility of the instrument as evidence could be indulged, because of an apparent variance similar to that under consideration. But when, as in the present instance, the prosecuting attorney adopts, in preference, the authorized and indeed commendable, because safer, practice, of setting out in the body of the indictment the instrument in *hæc verba*—in the words and figures in which the instrument is couched—the very converse of this is the rule, and the variance becomes fatal, not alone because when the pleader has undertaken to set out the instrument according to its "tenor," which is equivalent to "words and figures as follows," he is bound to the strictest accuracy (*Brown* v. *People*, 1 Hawley Am. Crim. Rep. 228), but because the indictment, in averring that the "words and figures are as follows," has announced a material descriptive allegation that must be proved, and that is *not* sustained by an instrument that is *not* couched in the same and the precise language averred in the indictment; and such instrument is, in our opinion, unquestionably inadmissible because of the variance. The principle, moreover, is as old as criminal jurisprudence itself, that, if the pleader in charging an offense has charged it with unnecessary minuteness or particularity, he is nevertheless required to prove every individual allegation as laid in the indictment. No proof short of the fact that the witness-clause was actually "in presence of John Gardner, Henry Miller," would suffice to meet this imperative requirement in this case, for so the indictment has affirmatively charged it to be. *Warrington* v. *State*, 1 Texas Ct. App. 168.

Admitting for the mere sake of the argument that, as contended by the appellant, the attachment of these names as witnesses to the forged instrument was not in itself a necessary element of the crime of forgery — or at least not material or indispensable to the sufficiency of the indictment — it cannot be eliminated as surplusage, and the instrument be thus qualified as evidence, because, in describing the instrument, the indictment has alleged that the words quoted appear as stated, and their presence becomes simply and absolutely indispensable to the identification of the instrument offered in evidence and that described in the indictment as one and the same; and because further, having avowedly undertaken to set the instrument out according to its tenor, *hæc verba*, or as expressed in terms "in words and figures as follows," the State must prove that just such, and the *identical* words alleged in the indictment were parts of the instrument, and it cannot, without showing a fatal variance, prove a single word more. See also *Commonwealth* v. *Gillespie*, 7 Serg. & R. 469.

Upon a careful consideration of the question, we conclude that the court did not err in excluding the evidence upon the appellant's objection. *Roberts* v. *State*, 2 Texas Ct. App. 4; 32 Ark. 609; 7 Serg. & R. 469.

Applying the doctrine of former jeopardy to the proceedings in this case, it follows as a sequence to the views expressed that that plea cannot avail the appellant. The court below committed no error in permitting the county attorney to dismiss the proceedings under the indictment, and it is a principle of law settled beyond peradventure, that a *nolle pros.* is no bar to a further prosecution, even though entered after conclusion of argument. *Swindel* v. *State*, 32 Texas, 102; *Longley* v. *State*, 43 Texas, 490; *Brill* v. *State*, 1 Texas Ct. App. 152. The plea must show that the former trial was for the same offense. 43 Texas, 347; *Id.* 351; *Quitzow* v. *State*, 1 Texas Ct. App. 47. The proof must identify the two offenses as the same (2 Texas Ct. App. 187; 4 Texas Ct. App. 29; *Id.* 34), the usual test being whether the same evidence necessary to support the second prosecution would have supported the first. *Lowe* v. *State*, 4 Texas Ct. App. 34.

Upon an objection raised and urged by the appellant himself, the court properly excluded from evidence, because of variance, an instrument that was vital to the interests of the State, and permitted the prosecuting attorney, at a stage of the proceedings when unquestionably it had the power, to enter a *nolle pros.* and to present a sufficient complaint to charge the appellant with the forgery of the instrument for which he was being prosecuted. In no sense do the complaint and indictment charge offenses identical. The descriptive averments respectively disclose different documents. Unless the evidence that must be invoked to sustain a prosecution under the complaint is such as would have supported the prosecution under the indictment, the plea must be held futile. That the evidence essential to support the prosecutions in the two cases is not identical — that it is not of equal force or conclusiveness, nor tends to the same effect, is susceptible of easy demonstration. The preliminary evidence, the oral testimony relating to the transactions participated in by the appellant in connection with other parties to the forgery, before the actual execution of the forged instrument, would, doubtless, on both trials have been the same, and yet that evidence alone would have been ineffectual to sustain either prosecution.

The evidence vital and indispensable to the prosecution in this case was the forged instrument itself, and it cannot be pretended, upon any color of reason, that the instrument as set out and described in the indictment could have been sustained and a conviction supported by the instrument itself, however sufficient it may have been to sustain a conviction under the subsequent complaint. The evidence necessary to sustain the second prosecution is not of such character as would have sufficed to sustain a conviction under the first. From the view that we take of this case, it is not necessary for us to decide whether or not a verdict of the jury is essential to the sufficiency of a plea of former jeopardy, as seems to be contemplated by the Revised Statutes (Code Crim. Proc. art. 20), or whether the rule is as laid down in Vestal's case, 3 Texas Ct. App. 648; or further, whether or not the Legislature had the right and power to construe the term "former jeopardy."

In the case of *Pitner* v. *State*, 44 Texas, 578, Chief Justice Roberts, speaking for the court, held that on *habeas corpus* the accused cannot interpose the plea of *autrefois acquit*,— and that he could only have its benefit by special plea entered in the court in which the indictment is pending. (See that case and authorities cited.) While we do not feel called upon to decide whether or not the same rule applies to a plea of former jeopardy, we feel authorized in saying that the pleas have many characteristics in common, and much of the same reasoning is applicable and strong in support of both. (See also *Perry* v. *State*, 41 Texas, 488, in which the subject is somewhat more elaborately discussed by the present chief justice.) The plea of former jeopardy is not well taken.

It remains for us to consider whether or not the courts of this State have jurisdiction, under the laws in force prior to the act of 1876, to try parties for the forgery of titles to Texas lands, when the evidence shows that the forged instrument was executed in another State.

That the evidence discloses beyond question that the actual execution of the instrument alleged to be forged took place in Chicago, Ill., is not disputed. This fact being shown affirmatively, the appellant contends that the forgery was not an offense against the laws of this State, but of Illinois, and therefore is not cognizable in this State.

Without undertaking to give even a substantial synopsis of the facts testified by the witnesses on the stand, it is sufficient to say that with certainty enough to show a strong probability of the complicity of the appellant in the steps preliminary to the execution of the forged instrument in Chicago, it was testified that the conspiracy to manufacture the bogus title to the Gritten league of land in Travis county, was entered into in the city of Austin, and this appellant was a party to it; that appellant furnished from Austin the *fac simile* of the signature of Gritten, the certificate of John P. Kale, county clerk of Polk county, subsequently used in the execution of the forged instrument, and certain bogus seals; and that the instrument was forged *for* and at the request *of* the appellant, was returned to appellant at Austin, and by him, acting through his partner in this transaction, was placed on record in Travis county.

These facts being shown by the State, the question for our solution is this: Was the offense charged in the indictment complete in the State of Texas, when the agent completed the performance of his part of the conspiracy in Illinois, in pursuance of the common design, originated and entered into in Travis county, Texas, to forge the deed of conveyance in question? If this proposition can be answered in the negative, then the plea to the jurisdiction of the Texas tribunal must prevail; otherwise it is of no force.

The case of *The Commonwealth* v. *Harvey*, 8 Am. Jurist, 69, is one in which the defendant, a resident of New York, forged a draft in Albany and placed it in the hands of a broker there to be forwarded to Boston, Mass., where it was paid and the proceeds remitted to the defendant, who did not, during these transactions, leave the State of New York. He was indicted in the State of Massachusetts for the utterance in that State of the forged draft, and though he was shown to have committed the offense through an agent, the broker, who likewise resided in Albany, and outside the State of Massachusetts, he was held amenable in the latter State, was tried, over an objection to the jurisdiction of Massachusetts courts, was convicted, and the conviction sustained. As relied upon by the prosecution in the case of *The People* v. *Adams*, 3 Denio, 190, the adjudication in Harvey's case was assailed vigorously by counsel for the defense as enunciating a principle alike dangerous and unwarranted, and establishing a precedent whereunder a defendant might be held liable to two different jurisdictions for the same offense. But, though insisted upon with consummate zeal and ability by counsel, the court, in the Adams case, in which the issue decided was that the personal presence at the place where the crime was committed was not essential to constitute the offender a principal, did not concur with counsel, or hold that the adjudication in the Harvey case was obnoxious to the weight of authority; and the doctrine enunciated in Harvey's case, as applied to the Adams case, prevailed.

It would be difficult indeed to imagine a case which, in its prominent features, could be more directly in point than the Massachusetts case referred to. In that case the common law principle *qui facit per alium facit per se*, which is of universal application both in criminal and civil cases (3 Conn. 8), was recognized, and the court maintained jurisdiction over the offense though the paper was forged outside the limits of the State, and was uttered from the place where forged and through the instrumentality of an agent who likewise lived where the paper was forged. The issue in that case was the utterance of a forgery in Boston. It was uttered from Albany, New York, through the medium of an innocent agent, and the defendant was held guilty in Massachusetts. Its criminal intent was to affect the laws of Massachusetts. The issue in this case is the forgery of an instrument designed to affect the laws of this State. Like the utterance in Harvey's case, it was forged from abroad — from Chicago — through the instrumentality of an agent or co-conspirator; the State in this instance resting its position upon the stronger ground that it was likewise forged in pursuance of a previous conspiracy between the agent and the defendant, entered into in this State, to do a criminal act, to be consummated here, and which in its results was to affect a vicious purpose in this State only.

The Commonwealth v. *Gillespie* is a strong case in point, and thoroughly sustains the doctrine announced in Harvey's case. See 7 Serg. & R. 469. This was a prosecution sustained in a Pennsylvania court against a citizen of New York, for selling lottery tickets in Philadelphia through an agent. In asserting the jurisdiction of the

Pennsylvania court, the learned judge who delivered the opinion pertinently remarked: "For the law would be a dead letter — we would become the laughing stock of our sister States, either for the inaccuracy and little foresight of our law-makers, or for the imbecility of those employed in their administration,— if such a procedure as this was not brought within the law; if our neighbors from New York or Baltimore could levy a revenue in this State by the employment of a child or slave." * * * "It must be recollected, the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design and of interest, there can be no good reason why both may not be tried where an overt act is committed."

Conspiracy in this case is not a matter of inference, but a matter of direct testimony. Of the overt acts leading up to the consummation of the criminal enterprise, the procuration by the defendant of the *fac simile* of the forged signature was one, of the certificate of authentication was another, of the spurious seals was another, the furnishing of the same to the agent or co-conspirator was another; and when the agent, by the act of forgery at the request of and for the use and benefit of the defendant, committed his part of the criminal design in Chicago, and forwarded the instrument to the defendant in Texas, the offense, in our opinion, was complete in Texas, and strengthened when the defendant received the same and had it put upon record.

In *Com.* v. *Corlies*, the question is elaborately argued, and the principle we have stated is supported. See 3 Brewster (Pa.), 575, citing 4 Wend. 229; Archb. Cr. Pr. 6; *Com.* v. *Tack*, 1 Brewster, 511; *The King* v. *Brissac*, 4 East, 174, citing *The King* v. *Bowes*, *Id.* See also *The*

King v. *Johnson*, 6 East, 583; 7 *Id.* 65; *Rex* v. *Munton*, 1 Esp. 42; *Barkhampsted* v. *Parsons*, 3 Conn. 8; *U. S.* v. *Davis*, 2 Sum. 485; 21 Wend. 528 to 541.

The last subdivision of chapter 5 (Book 2, p. 104), secs. 104 *et seq.*, Bishop's Crim. Law (4th ed.), demonstrating the correctness of the principles upon which the question is decided in this opinion, presents more forcibly than we can hope or expect to, the reason of the rule, and indicates clearly the fallacy of the arguments which, not only in this but in all of the adjudicated cases cited, have been urged in opposition, and a careful perusal of that discussion *in extenso* will suffice to show the peculiar force of the doctrine. It is commended as a fair and satisfactory exposition of the rule of law that must govern the question, founded alike upon common sense and common justice.

The recognition of the principle contended for by the appellant would not only be to disregard the letter and spirit of the law as we find it, but to recognize a principle fraught with the greatest evil and mischief. It would be to authorize the unscrupulous, through foreign agents, to prey upon the substance of our citizens, free from immunity and in contempt of the privileges and rights vouchsafed the people by the Constitution.

The conspiracy to appropriate the Gritten land was deliberately concocted in the city of Austin, and the defendant was, according to the evidence, a deliberate party to that conspiracy, and in prospective its chief beneficiary. In furtherance of that design the *fac simile* of the signature necessary to evidence the pretended act of conveyance was surreptitiously obtained in Austin by defendant himself, as were also the certificate of authentication and the field notes of the survey,—and everything, in short, save the ink and perhaps the paper necessary to the commission of a grave offense against the laws of this State, to be consummated here and to inure to the special benefit of the defendant,— was done by him here; and when the agent in Chicago completed and performed his part of the general design, the offense was complete in this State.

We have thus endeavored to support the jurisdiction of our State court in this case upon general principle and authority, because the question has thus been argued by learned counsel. Suppose for the sake of argument, however, that the authorities cited above fail, when strictly considered, to maintain the position (and we admit that none of them are in all respects entirely analogous), still we are of opinion that, when our statute itself is examined, it will be found amply sufficient to cover completely and fairly the question of jurisdiction, and to establish beyond cavil the liability of defendant to answer for his crime in the courts of our State. These statutes are in exact harmony with the views above expressed. Let us see what was the law when this forgery was executed. "He is guilty of forgery who, without lawful authority and with intent to injure and defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever." (Penal Code, art. 431.) Pas. Dig. art. 2093. Such is the general definition of the offence. But the statute does not stop here. In declaring who shall be held guilty under it it expressly provides, "He is guilty of making * * * under art. 431, *who, knowing the illegal purpose intended, shall write or cause to be written* the signature or the whole or any part of the forged instrument. *All persons engaged in the illegal act are deemed guilty of forgery.*" (Penal Code, art. 435.) Pas. Dig. art. 2097. It does not say that he who shall write or cause it to be written *in* *this State,* but has he caused the illegal act to be done here, or in Illinois, or anywhere else, no matter where. That is the sole pertinent inquiry. If so he is guilty of forgery here. There can be no escape from the plain, unambiguous language and intention of the statute. Upon that and that alone, without going further, we can safely and confidently rest, under the evidence adduced, the jurisdiction of the District Court of Travis county to hear and determine this case.

It is unnecessary to prolong the discussion. We have given the questions presented in this appeal that careful, deliberate consideration their importance demanded, and we are of opinion the court below did not err in its judgment refusing to discharge the applicant under the writ of *habeas corpus;* and the judgment is therefore affirmed.

Affirmed.

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MONT. HILL *v.* THE STATE.

1. **BILL OF EXCEPTIONS.**—An unauthenticated bill of exceptions will not be considered by this court for any purpose whatever.
2. **VERDICT — SENTENCE — PRACTICE IN THIS COURT.**—When the sentence of the court is not in conformity with the verdict of the jury and the judgment entered thereupon, and the record discloses no other error, this court will not reverse and remand the case, but will reform the sentence so as to conform to the verdict and judgment.

APPEAL from the District Court of Collin. Tried below before the Hon. JOSEPH BLEDSOE.

The opinion discloses the case.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant and another were indicted for the theft of a saddle, the property of one Baccus, alleged to be of the value of twenty dollars.

The appellant, being tried separately, was found guilty of theft of property worth $20, and his punishment was assessed at five years' confinement in the penitentiary. Judgment was entered in accordance with the verdict; the appellant was adjudged guilty of theft as found by the jury, and his punishment was by the judgment fixed at confinement in the State penitentiary for the term of five years. A motion for a new trial was made and overruled, and notice of appeal was given. When the defendant was brought before the court for the purpose of receiving the sentence of the law, the court in passing the sentence condemned and sentenced him to confinement in the State penitentiary at hard labor for the space and term of two years, and directed that he be conveyed to and confined in the penitentiary for a period of two years.

Various errors are assigned, and a bill of exceptions is set out in the transcript, which, not being signed by the judge or otherwise authenticated, amounts to nothing. It is unnecessary to discuss in this opinion the errors assigned; suffice it to say that they have all had the attention their importance demands, and we are constrained to say we find no such error as would warrant a reversal of the judgment. Inasmuch, however, as the sentence of the court is not in conformity to the verdict and the judgment, the same will be reformed by this court so as to conform to the verdict and judgment, as these form the basis of the sentence. The judgment being for five years, the sentence, which is for two years, will be reformed so as to read five years' confinement in the State penitentiary, instead of and where the term of two years is mentioned in the sentence as announced by the judge below, and being thus reformed the judgment is affirmed.

Affirmed and sentence reformed.

Jack Reside v. The State.

1. **Embezzlement.**— **Indictment** or information for embezzlement must allege the value of the embezzled property.
2. **Same.**— The value is not sufficiently alleged by describing the embezzled property as "eight dollars in money consisting of one five-dollar bill, one two-dollar bill, and one one-dollar bill, circulating medium current as money."
3. **Same — Theft — Indictment.**— Appellant was charged with embezzlement as a "bailee" of certain funds "to be by him conveyed" to a designated place. *Quære:* Should not the prosecution have been for theft instead of embezzlement, conformably to article 788 of the Revised Penal Code, whereby embezzlement by a carrier is made theft?

Appeal from the County Court of Parker. Tried below before the Hon. J. M. Richards, County Judge.

The opinion sufficiently discloses the case.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Winkler, J. The information charges the defendant with embezzlement, as follows: "That on, to wit: the 10th day of March, A. D. 1879, in the county of Parker and State of Texas, Jack Reside, who was then and there the bailee of eight dollars in money consisting of one five-dollar bill, one two-dollar bill and one one-dollar bill, all of which was then and there a circulating medium current as money, a more particular description of which cannot be given, and all then and there the property of Alonzo Hunt, did then and there embezzle, fraudulently misapply, and convert to his own use said money, without the consent of said Alonzo Hunt, who had then and there entrusted said money to said Jack Reside to be by him conveyed to Fort Worth, Texas, for him the said Alonzo Hunt, and which said money had then and there come to the possession of said Reside, and was then and there under his care, by virtue of said bailment as aforesaid; against," etc.

Without attempting to criticise the information in other respects, we are of the opinion it is defective and insufficient to support a judgment of conviction for the crime of embezzlement, in that there is no direct substantive averment of the value of the money charged to have been embezzled. It is true the information charges that the defendant as bailee was entrusted with eight dollars in money, but the pleader goes on to particularize that the money consisted of a five, a two, and a one-dollar bill, but does not state that it is gold, silver or current paper of the United States or of any other government or country; and whilst it states the denomination of the several bills, there is no attempt made to state the value of said bills or either of them, or that they had any aggregate or separate value whatever. It is not averred even that the bills were genuine.

When a proper charge of embezzlement is made out, the punishment is the same as for theft. Original Penal Code, arts. 771-2. If the defendant in the case under consideration is liable at all, it is believed that his liability must be ascertained under art. 772. It is evidently intended to charge him with having been entrusted with the money in the capacity of a carrier. Now, if any carrier to whom any money, goods, or other property shall be delivered to be carried by him, or if any other person who shall be entrusted with such property, shall embezzle or fraudulently convert to his own use any such money, goods or property, either in mass as the same were delivered, or otherwise, he shall be deemed guilty of theft, not embezzlement, and shall be punished as prescribed for that offense — theft, according to the value of the money, goods or other property so embezzled or converted. Original Penal Code, art. 772; Rev. Penal Code, art. 788. Should not the information under this article have been so framed as to charge this defendant as carrier rather than as bailee? But be this as it may, the punishment for embezzlement being the same as for theft, the indictment or information should, as in theft, aver the value of the property or thing embezzled, in order to regulate the punishment. In theft, except of particular kinds of property, as a horse, where the law fixes a definite punishment without reference to the value, the value must be averred and proved. Theft of property of twenty dollars and over in value is punished by one rule, whilst theft of property in value less than twenty dollars is punished by a different rule altogether.

The information being defective and insufficient, the judgment will be reversed and the prosecution dismissed.

Reversed and dismissed.

WILEY ADAMS *v.* THE STATE.

NEW TRIAL.—In a trial for theft the only evidence which tended to incriminate the defendant was the testimony of a State's witness who, prior to the trial, assured the defendant and his counsel that he knew nothing whatever about the case and nothing inculpatory of the defendant. In view of the deceit thus practised on the defendant and the unreliable character of the evidence against him, this court sets aside the conviction and awards a new trial.

APPEAL from the District Court of Williamson. Tried below before the Hon. W. A. BLACKBURN.

The opinion discloses the case. In the defendant's motion for a new trial it is alleged that his counsel ineffectually asked the court for a short postponement of the trial, to enable the defense to send for witnesses who would contradict the principal witness for the State. The ruling of the court, however, on the application for a postponement does not appear to have been excepted to.

A term of two years in the penitentiary was the punishment assessed against the appellant.

Makemson, Fisher & Price, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. We are of opinion that the testimony upon which the appellant was convicted, as we find it embodied in the statement of facts, is not of that convincing character which ought to deprive a citizen of his liberty and render him infamous among his fellows for the balance of his natural life.

The alleged owner of the animal alleged to have been stolen by the appellant, and who testified on the trial, does not connect the defendant in any manner with the animal otherwise than to say, "he never gave this defendant or any one else his consent to kill the yearling." One other witness was introduced on behalf of the prosecution. This witness testified that at a certain place and time he saw the defendant, Wiley Adams, and his oldest son killing and skinning a dun, pied heifer yearling, branded N. H. P., belonging to James Pratt; that he knew the animal by its flesh-marks, and lived at the time but a few hundred yards from defendant and James Pratt. This witness on cross-examination says he did tell defendant at the January term, 1880, of this court, in the presence of W. K. Makemson, A. S. Fisher, and Green Adams, that he, witness, knew nothing about this case, that he did not see the defendant at any time have the yearling in possession, never saw him kill the yearling, and never saw him have anything to do with it in any way. He further said he told the defendant that he could not tell him what he, witness, would swear to, because he was under oath by the grand jury, and said he was drinking at the time. The defendant introduced the three persons to whom the last-mentioned witness had made the statements according to his cross-examination as above set out, who all say that he, the State's witness, did tell the defendant at the January term, 1880, of this court, that he never saw the defendant having anything to do with Pratt's yearling, never saw him kill it or have it in his possession; that he said he was not before the grand jury, and that he did not know why they had not found him. This is the substance of the testimony so far as it goes to connect the defendant with the theft.

Whilst it is true a defendant accused of crime ought not to rely upon the statements of a witness made to him out of court before the trial as to what he would testify to at the trial (*Fagan* v. *State*, 3 Texas Ct. App. 400), still we are of opinion that it was not improper for the defendant to endeavor, in preparing to make his defense, to ascertain, if he could do so by legitimate means, what the evidence on the part of the prosecution against him would be; and, whilst the witness would be under no sort of obligation to disclose beforehand what his testimony would be on the trial, yet we imagine but few instances will be found where the witness would be warranted in making false representations to one accused of crime, in order to entrap him, and, by inducing him to believe that there was no evidence against him, cause him to relax his efforts in preparing for his defense, and then go on the witness-stand and swear directly to the reverse of what he had told the defendant prior to the trial. We do not wish to be understood as holding that there are not cases where a necessity exists for a resort to artifice to induce a confession and the like, but it can seldom become necessary to resort to the statement of an untruth or, what is nearly the same thing, the wilful suppression of the truth, in order to procure a conviction. It is true the jury were the judges of the facts. In all cases they are the exclusive judges of the facts proved and of the weight to be given to the testimony, except in the instances provided for specially in the Code of Procedure, art. 728. And in the present case the jury were so instructed by the court, and still they convicted the defendant under this testimony, and the court refused a new trial. It is one of the modes recognized by the law by which to impeach the credibility of a witness, to show that he has made statements out of court contrary to what he has testified to on the trial, the attention of the witness having been called particularly to the supposed contradictory statements, as to time and place, the persons to whom made, and the like. The whole of the testimony adduced goes generally to the jury who are authorized to pass upon it, and under ordinary circumstances this court would not disturb a verdict where there is merely a weight in the testimony, or because of a preponderance of testimony on one side or the other of the controversy, provided always there is any legal evidence upon which a verdict can rest. In this case, however, the testimony which tends in any way to connect the defendant with the crime with which he is charged comes in such a questionable shape as we find it in the record before us, that we do not deem it sufficient to base a conviction upon, and thus to stand as a precedent.

There was a feeble effort at obtaining a new trial on the ground of newly discovered evidence, which the court below very properly overruled. *White* v. *State, ante,* p. 381, and authorities there cited. The indictment is deemed sufficient. There is no other error perceived, but, because there is no testimony not of a very questionable character, and but little of that which goes to establish the guilt of the defendant, the judgment ought to be reversed and the case remanded for a new trial; and it is so ordered.

Reversed and remanded.

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JOHN SIMPSON v. THE STATE.

1. **EVIDENCE.**— When a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of description must be proved, inasmuch as all are made essential to the identity.
2. **THEFT.**— In a trial for ordinary theft it is incumbent on the State to prove the value of the stolen property, notwithstanding it was currency such as the United States silver certificates.

APPEAL from the District Court of Bell. Tried below before the Hon. B. W. RIMES.

The case is indicated in the opinion. The evidence for the State was circumstantial so far as it tended to inculpate the appellant. When accused by the owner, the appellant denied the theft, but said he would rather give the owner fifty dollars than be charged with the crime, and paid to him two ten-dollar silver certificates and some other currency. The two certificates and another one which defendant had paid to a merchant had marks upon them by which the owner thought but was not certain he recognized them as three of the five certificates stolen from him.

W. T. Shannon and *W. R. Houston*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant being on trial charged with the theft of five silver certificates, United States currency bills, of the denomination and value of ten dollars each, and of the aggregate value of fifty dollars, it became a question whether the proof adduced on the trial was sufficient to support the descriptive averments in the indictment as to the silver certificates alleged to have been stolen. It is averred in the indictment that the five silver certificates alleged to have been stolen were United States currency bills, and that each one of the silver certificates was of the denomination of ten dollars and of the value of ten dollars; and the aggregate value is also averred at fifty dollars. It became necessary, in order to a conviction, that the State should substantiate by testimony these descriptive averments contained in the indictment,—first, that the silver certificates mentioned in the indictment, or a portion of them at least, had been issued by authority of the United States government, and secondly, that the silver certificates, or a portion of them at least, were of the value alleged in the indictment.

The court in its general charge having omitted to give the jury an appropriate charge on this subject, the defendant's counsel attempted to supply and correct the omission in the charge of the court by requesting that special instructions be given to the jury to the effect that every material allegation charged in the indictment must be proved or alleged. This instruction was refused by the court. The ground of the refusal being, as stated by the judge, that the law applicable to the case had been given in the general charge, counsel for the defendant requested other special instructions to be given to the jury calling their attention specially to the necessity that the proof must show that the silver certificates had been issued by authority of the United States government—that they were of the United States—and also that the silver certificates were of the value of ten dollars each as alleged, in order to warrant a conviction. These instructions were also refused. It is conceded that these several special instructions were in some respects inartistically framed, yet it is believed that they were sufficient to call the attention of the court to what we regard as an important omission in the general charge.

However this may be, we are of opinion that it was indispensable that the averments descriptive of the property alleged to have been stolen, as set out in the indictment should have been proved substantially as averred, and that the jury should have been properly informed on this branch of the subject, as a part of the law of the case and whether requested or not. It cannot longer be considered an open question in this court that the descriptive averments incorporated in an indictment for the purpose of identifying the offense charged, as, for instance, for the purpose of identifying property alleged to have been stolen, must be proved as alleged; and the rule applies even when the averment of identity is unnecessarily particular. *Warrington* v. *State*, 1 Texas Ct. App. 168; *Courtney* v. *State*, 3 Texas Ct. App. 382; *McGee* v. *State*, 4 id. 625; *Watson* v. *State*, 5 id. 11; *Hampton* v. *State*, 5 id. 463; *Allen* v. *State*, 8 id. 360.

Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of description must be proved; for they are all made essential to the identity. 1 Greenl. Ev. § 65. A plain application of the rule and the reason for it is given in the elementary works on evidence, as follows: "In an indictment for stealing a *black* horse, the animal is necessarily mentioned, but the color need not be stated; yet if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal." 1 Stark. Ev. 374; 1 Greenl. Ev. § 65.

In cases of theft of particular kinds of property, for example theft of a horse, which is punishable by confinement in the penitentiary without regard to the value of the horse, proof of value is of but little moment; but, in cases of theft generally, and when a particular punishment is not prescribed without regard to value, proof of value is necessary in order to determine the punishment; the law being that theft of property of the value of twenty dollars or over that amount is punishable as a felony by confinement in the penitentiary, not less than two nor more than ten years (Penal Code, art. 735); whilst theft of property under the value of twenty dollars is punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine. Penal Code, art. 736; *Sheppard* v. *State*, 1 Texas Ct. App. 522.

Because of error in the failure of the court to charge the law of the case as made by the proofs, and because there is no pertinent evidence of the value of the property alleged to have been stolen, the court below should have granted the defendant a new trial. Other errors are complained of, which are not likely to arise on another trial; but for those pointed out above, the judgment must be reversed and the case remanded.

Reversed and remanded.

JOHN GRAHAM *v.* THE STATE.

1. STATEMENT OF FACTS.—The judge before whom the case was tried is the only person who can authenticate the statement of facts.
2. SAME.—By the record it appears that the regular judge of the court held the term at which the conviction was had, and his official signature is appended to the charge given to the jury. Instead, however, of his signature or approval appearing to the entry which purports to be the statement of facts, that entry is certified by another person as "special judge," and this anomalous proceeding is unexplained. *Held*, that the entry cannot be considered a statement of facts.

APPEAL from the District Court of Hopkins. Tried below before the Hon. GREEN J. CLARK.

The indictment charged the appellant with the murder of P. M. Steed, on October 20, 1877, by shooting him with a double-barreled shot-gun. He was found guilty of murder in the second degree, and a term of five years in the penitentiary was assessed as his punishment.

According to the so-called statement of facts, the appellant and the deceased were neighboring farmers. Finding certain mules of the deceased depredating on his field, the appellant confined them in a pen, and, in reply to a message from the deceased, refused to release them until the latter should pay for the damage they had done. When this reply was brought to the deceased, he sent his messenger back to tell the appellant that if he did not turn the mules out, he, the deceased, would come over there and shoot the top of his head off. Appellant sent the messenger back to the deceased with instructions to tell him to come on, and that he, the appellant, would be ready for him. When the messenger left, the appellant took his gun and went into a room on the end of his front gallery. In a short time the deceased approached the gate, which was about thirty feet distant, and called out "halloo," and was immediately fired upon by the appellant. Five shots penetrated the face, head and neck of the deceased, killing him instantly. No weapons were found on the body of the deceased. It was in proof, however, that his left hand was under the lapel of his overcoat as he came up to the appellant's gate. Appellant left the neighborhood, but was subsequently brought to trial.

No brief for the appellant has reached the reporters.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was tried and convicted for the murder of P. M. Steed, and his punishment fixed at confinement in the penitentiary for the term of five years.

It appears from the record that the Hon. Green J. Clark presided when the court was opened and adjourned, and that he charged the jury in this case. The statement of facts is approved by E. B. Perkins, special judge, and this is the only mention of E. B. Perkins in the record. There is no explanation of this matter to be found in the record.

The statement of facts must be approved by the judge who tried the case. In *Myers* v. *State*, 9 Texas Ct. App. 157, it was held that "the approval of the judge who presided at the trial is indispensable to a proper authentication of a statement of facts, and that the regular judge of the court cannot authenticate the statement of facts in a case which was not tried before him."

As the statement of facts is not properly authenticated it will not be considered by this court. This being the case, we will only consider the indictment and charge of the court. There are no bills of exception. The indictment is drawn in proper form; the offense is set forth clearly and distinctly, following the most approved forms. The charge, considered with reference to the indictment, is without objection in any respect.

If there were any peculiar phases made by the evidence which required an application of the law directly to be made to these phases, in order for this to be considered by this court the statement of facts must show them, and as there is no statement of facts this cannot legally appear to this court.

Finding no error in the record, the judgment is affirmed.

Affirmed.

MACK KEETON *v.* THE STATE.

BILLS OF EXCEPTION, to be considered for any purpose on appeal, must be prepared and certified during the term of the trial court at which they are taken. But, if the trial court, by special order entered of record during the term, allows the statement of facts to be prepared and filed within ten days after the adjournment, as it may now do, exceptions to evidence admitted over objection may be embodied in it. See the opinion for a collocation of the Rules of Court and statutory provisions which control this matter.

APPEAL from the District Court of Freestone. Tried below before the Hon. L. D. BRADLEY.

The indictment presented in the District Court of Freestone county, on the 19th day of April, 1881, charged the appellant with the murder of Kete Keeton, on the 18th day of the same month. On the 29th day of the same month he was brought to his trial, found guilty of manslaughter, and was awarded by the jury a term of four years in the penitentiary.

The testimony discloses in substance that a party of negroes, including the deceased and the defendant, were returning to their homes in the country, from court, late in the evening of April 18th, 1881. All had been drinking, and some of them at least were under the influence of liquor. The deceased and the defendant got into a dispute about the running qualities of certain horses, and finally dismounted from their horses and engaged in a fight. They were separated once, but presently renewed the fight, the deceased throwing the defendant. The two fell together, but struggled to their knees. The deceased on releasing the defendant and getting up said that he was cut. It was discovered that he was stabbed in the abdomen, from which wound he died an hour or two later. Defendant and deceased were brothers.

No brief for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

WHITE, P. J. This is a case of fratricide upon a sudden quarrel, resulting in a succession of personal conflicts and culminating in appellant's inflicting a mortal stab with a knife, from which his brother died in a very short time. Only one question is raised by the record which it is considered important to notice, and that is one of practice.

Quite a number of exceptions appear to have been reserved and noted during the trial, but the bills embodying them were not prepared, presented to and signed by the judge at the time. By an order entered of record, as provided by statute (Rev. Stats. art. 1379), the parties were granted ten days after adjournment of the term, to make up and file the statement of facts. Adjournment of the term occurred on the 30th day of April; the statement of facts was presented to and signed and certified by the judge on the 10th of May. At the same time (to wit, 10th of May) the bills embodying the exceptions reserved at the trial were presented to and signed by the judge, and that is the date of their allowance and authentication.

The question is, will bills of exception not taken and certified during the term be considered for any purpose when found in the record on appeal, even though allowed and attested by the judge? A negative answer must follow from the clear and unmistakable language of both the rule of court and the provisions of the statute. Rule 60 for the government of the District Court is in these words: "When exceptions are made to the admission or exclusion of evidence on the trial before the court or before the jury, the exceptions will then be decided after such argument as the court may allow, and a memorandum of the point ruled will then be made by the judge if the bills of exception are not then prepared and signed, which ordinarily should be done, *and must be done during the term.*"

If we turn to the statutes we find in chapter sixteen, entitled "Bill of exceptions" (Revised Statutes), the following provisions, viz.:

Art. 1363. "It shall be the duty of the party taking any bill of exceptions to reduce the same to writing and present the same to the judge for his allowance and signature *during the term and within ten days after the conclusion of the trial.*"

Art. 1364. "It shall be the duty of the judge to submit such bill of exceptions to the adverse party or his counsel, if in attendance on the court, and if the same is found to be correct it shall be signed by the judge without delay, and filed with the clerk *during the term.*"

Thus it will be seen that it is imperative that the bill of exceptions should be filed *during the term and within ten days after the conclusion of the trial,* should the term last so long. There is, we apprehend, only one exception to the rule that exceptions to rulings upon evidence will not be considered where a bill of exceptions is not filed during the term, and that is where "exceptions to evidence admitted over objections made to it on the trial may be embraced in the statement of facts in connection with the evidence objected to." Rule 56 for the District Court. If exceptions to evidence appear in the statement of facts, they will be considered without any bill of exceptions. *Howard* v. *North,* 5 Texas, 290; *Cooper* v. *State,* 7 Texas Ct. App. 194; *Castanedo* v. *State,* 7 Texas Ct. App. 582.

Had the exceptions to the evidence been made to appear in the statement of facts in connection with the evidence objected to, then they would have been entitled to consideration notwithstanding they were not filed during the term, because the law allows the statement of facts to be made up, under a special order entered during the term, and filed in vacation, not exceeding ten days after adjournment. Rev. Stats. art. 1379. In the case before us the exceptions are not noted in the statement of facts, but are presented solely in independent bills, signed by the judge on the 10th day after the adjournment of the term. By all the rules they are not available for any purpose on appeal, even if worthy of consideration had they been properly taken. Over and above the matters stated in the bills of exceptions, there is nothing in the record requiring discussion. Having been found guilty of manslaughter, the first special instruction requested for defendant ceases to be of any importance. The other special instructions, so far as they presented the law and were applicable to the facts, had been superseded by the general charge, which was a full and able exposition of the law. There being no error the judgment is affirmed.

Affirmed.

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JULIUS GERARD *v.* THE STATE.

1. EMBEZZLEMENT — INDICTMENT — EVIDENCE. — The indictment alleging the embezzlement of "one hundred and fifty-five dollars, then and there of the value of one hundred and fifty-five dollars, current money of the United States of America," it was incumbent on the State, in order to warrant a conviction for a felony, to prove that the embezzled property was, as alleged in the indictment, current money of the United States of America, and of value to the extent at least of twenty dollars.
2. FELONY — MISDEMEANOR. — The value of property stolen or embezzled must be proved in order to disclose whether the offense be a felony or a misdemeanor.
3. APPEAL — PRACTICE. — After an appeal has been perfected, jurisdiction of the case passes out of the trial court and attaches to this court, and hence any attempted correction of the record by the court below after appeal has been perfected, cannot be considered by this court for any purpose whatever.
4. RECORD ENTRY OF PETIT JURORS. — Note observations of Winkler, J., on this subject.

APPEAL from the District Court of Medina. Tried below before the Hon. T. M. PASCHAL.

The embezzlement for which the appellant was convicted is charged by the indictment to have been committed on the 24th day of December, 1880. The punishment awarded by the jury was a two years' term in the penitentiary.

The State proved in substance that Ferd. Niggli and Tolly Burnett, residents of Medina county, in their partnership capacity, were sub-contractors for the conveyance of convicts to the State penitentiary. That about the time alleged in the indictment they employed the appellant to go to Brownsville in Cameron county, and convey some convicts there confined, to the penitentiary at Huntsville. That for this purpose Niggli and Burnett furnished him with one hundred and five dollars, and subsequently supplied him with fifty dollars more, by postal order to Brownsville. That the money furnished the appellant was for the sole purpose of defraying the expenses of his employment. That the appellant totally failed to convey the convicts to the penitentiary as he had agreed to, and was employed to do, and had refused and failed to account for the money furnished him for that purpose, though often requested so to do. That the appellant did not return to Castroville, the place of his employment, until, having been arrested upon an information or charge growing out of this transaction, and placed under bond, he returned for his trial. The defense offered no evidence.

A. P. Bagby, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. By the indictment the appellant, who is alleged to be the agent and employee of Ferdinand Niggli and Tolly Burnett, is charged with the embezzlement of $155 alleged to have been entrusted to the defendant by Niggli and Burnett by virtue of his said employment and agency. The money alleged to have been so embezzled is described in the indictment as "one hundred and fifty-five dollars, then and there of the value of one hundred and fifty-five dollars, current money of the United States of America."

The averments in the indictment rendered it necessary for the State to prove these descriptive averments of the value and character of the money entrusted to the defendant; that is, that it was of the value stated in the indictment and that it was current money of the United States of America, to the extent at least of twenty dollars in value, in order to support a conviction for a felony. Embezzlement is punished in the same manner as theft. Penal Code, art. 786. Theft of property, other than of such as has a definite punishment prescribed, as a horse and the like, is punished as a felony or as a misdemeanor according to its value as shown by the testimony. If the property stolen be under the value of twenty dollars, the act is punished as a misdemeanor. Penal Code, art. 736. If the property stolen be of the value of twenty dollars or over, it is punished as a felony. Penal Code, art. 735. Every offense which is punishable by death or by imprisonment in the penitentiary, either absolutely or as an alternative, is a felony; every other offense is a misdemeanor. Penal Code, art. 54. Hence, aside from the necessity of proving the descriptive averments in the indictment, it is further necessary that the proof should show the value of the property, money, or other thing either embezzled or stolen, in order to grade the punishment; that is, in order that it may be determined whether the offense is a felony to be punished as prescribed in article 735, or whether it is a misdemeanor and punishable as prescribed in article 736.

The evidence fails to sustain the allegation in the indictment as to the value and kind of the money charged to have been embezzled, or to establish the value of the money or a sufficient amount thereof (twenty dollars or over) to support a verdict of conviction for a felony. For this reason the court below should have granted the defendant a new trial on the 4th and 8th grounds set out in his motion therefor. It is unnecessary to consider the other grounds set out in the motion for a new trial, for the reason that they are not likely to arise hereafter.

We cannot consider for any purpose the attempted correction of the record, made subsequently to the perfection of the appeal and after the jurisdiction had attached on appeal. After an appeal has been taken and the jurisdiction of the appellate court has attached, the case has passed out of the jurisdiction of the trial court, and it can make no further order in the case. The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had, until the judgment of the appellate court is received by the court from which the appeal was taken. Code Crim. Proc. art. 849; *Hill* v. *State*, 4 Texas Ct. App. 559; *Knight* v. *State*, 7 Texas Ct. App. 206. The supposed defect in the record which was attempted to be supplied by action taken subsequently to the appeal, is that the judgment entry sets out the names apparently of the jurors who sat upon the trial, and on an examination of the record it shows that the names of but eleven jurors appear. In *Rich* v. *State*, 1 Texas Ct. App. 206, this court met with a similar difficulty, except that in *Rich's* case there was no statement that the jury was composed of twelve persons, or any other number save as indicated by the eleven names set out, whilst in the present case the judgment entry, after reciting that the parties announced ready for trial, proceeds as follows: "Whereupon came a jury of twelve good and lawful men, to wit," and proceeds to set out the names of eleven jurors, and but eleven. In *Rich's* case it was said that if the record had stated that the jury was composed of twelve competent jurors we might be authorized to presume that the clerk had omitted a name in transcribing the record, but no such statement appearing the court declined to indulge that presumption in the face of the record. As the judgment must be reversed on another ground, and inasmuch as a similar difficulty is not likely to arise on another trial, a ruling on the question presented becomes unnecessary and immaterial.

It is the individual opinion of the writer, however, that, when the record recites the fact that a jury of twelve good and lawful men tried the case, this court would be warranted in indulging the presumption, when but eleven names are set out, that the clerk had omitted a name in making up the transcript, rather than that the judge who presided at the trial had permitted a trial to proceed to verdict with but eleven jurors, and that the recital that the jury was composed of the proper number was false. The cases of *Huebner* v. *State*, 3 Texas Ct. App. 458, and *Morton* v. *State*, Id. 510, are referred to as bearing upon the question.

The record should show that the jury in a felony case was composed of twelve men, no more no less than twelve; and whilst it may not be absolutely necessary that any of their names appear, the better practice would be to set out the name of the foreman who signs the verdict as such, and state that he and eleven others composed the jury. Unless some question should arise as to who composed the jury, or the like, it would answer the demands of the law to set out in the record that the jury was composed of A. B. (naming him) and eleven others, together with the other requisite statements as to swearing the jury, and the like. *Morton* v. *State*, *supra*. There is no reason why these matters of practice should not be made substantially uniform.

For the reason that the testimony as found set out in the transcript of the record before us is not sufficient to support the verdict, the judgment must be reversed and the cause remanded for a new trial.

Reversed and remanded.

JOHN SPRUILL *v.* THE STATE.

1. CATTLE THEFT.—In a trial for theft of a heifer alleged to belong to an unknown owner the evidence showed that the animal, though an estray and the owner unknown, was in the possession of the person on whose premises it ranged. *Held*, that the jury should have been instructed that the want of that person's consent to the taking of the animal by the defendant must be proved to the satisfaction of the jury, by circumstantial evidence or otherwise.
2. SAME.— See evidence held insufficient to sustain a conviction for the theft of an estray.

APPEAL from the District Court of Lampasas. Tried below before the Hon. W. A. BLACKBURN.

The evidence is disclosed in the opinion. A term of two years in the penitentiary was the punishment assessed against the appellant.

Makemson & Fisher, and *Matthews & Walker*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The count in the indictment upon which the defendant was tried and convicted charges the defendant with the theft of "one head of neat cattle, the property of some person to the grand jurors unknown, of the value of five dollars, without the consent of the owner and with the intent on the part of him the said John Spruill to deprive the owner of the value of said property and to appropriate the same to his own use and benefit."

The proof adduced on the trial seems to identify the animal alleged to have been stolen, as being the offspring of a certain stray cow bearing a certain mark and brand, and running in a certain range in Lampasas county, on and about the premises of one Thad. Brown, who, it seems, subsequently sold his place to one Lewis and moved away. When Brown sold out and moved away, he says he had some stray cattle posted, among which was one cow branded with the letters T. L., and marked with a cross and upper and underbit on each ear. Brown stated that the cow was known as an estray. He had made general inquiry, but had failed to find the owner, and says he marked the calf in the same mark the cow had, but did not brand the calf. He posted the cow as an estray, but did not post the calf, thinking the increase of the cow would go with her. He says that when he sold the place to Lewis, the defendant lived about 1 1-2 miles from the witness, at Newt. Knight's.

Another witness states that the cow was sold as an estray, but the (calf) heifer was not sold. He says that at a time mentioned he saw on the heifer what he took to be a brand, but could not tell what the brand was; it looked like a part of an S and a part of a K. He thinks the heifer was a two-year-old at the time he noticed the brand, and says she is now five years old (speaking with reference to the time of the trial, May 19, 1881). The brand when he saw it was not plain, but at the time of the trial could not be seen at all. The heifer, he says, ranged about his place, with the cow, and is still there in the range.

William Spruill, a State's witness, who gives his age as fourteen years on January last before the trial, says: "In the spring three or four years ago, the defendant and his brother, Rube Spruill, drove up some cattle and penned them in our pen, and left them there; a day or two afterwards the defendant came back and I saw him pick a brand on one of the animals left in the pen. It was a heifer he picked the brand on, but I do not remember certainly the age or color. I think she was a two-year-old, red-brindle, with white flanks and belly. She may have been one or three years old. The heifer was marked, but I do not remember the mark. The defendant picked the letters S. K. on the heifer, with his fingers." He further said he did not know what cow was the mother of the animal.

Witnesses for the defendant testified to having seen and known the animal in question, and had never seen any brand upon it or the like, and Newt. Knight and Lee Knight each testify that they know the reputation of the State's witness William Spruill for truth and veracity in the neighborhood in which he has been living, and that that reputation is bad. Having reference to the proof required of the State to warrant a conviction for theft, the testimony in this case is not sufficient for that purpose.

We are of opinion that the court did not err in refusing to permit the State's witness Brown to testify as to statements made by one Senterfit to the witness concerning the animal in question, as set out in the defendant's bill of exceptions No. 1. If what he had told the witness had been evidence in the case, it should have been proved by the man who made the statements, himself. To have permitted the witness on the stand to state it would have been to violate the well-settled rules of law which exclude hearsay testimony.

The defendant's 2d bill of exception recites the facts, that counsel for the defendant requested two special instructions to be given to the jury. The first instruction relates to the subject of proving that the name of the owner of the animal was unknown to the grand jury. The court had already instructed the jury sufficiently on this subject in the general charge; the one requested was unnecessary, and the court did not err in refusing it. Special instruction No. 2 was, in our opinion, an appropriate charge under the proofs, and the court erred in refusing to give it to the jury. This instruction involved the necessity of proving the want of consent of the person having actual possession of the property charged to have been stolen, in order to support a verdict against the defendant. *Erskine* v. *State*, 1 Texas Ct. App. 405; *Jack-*

son v. *State*, 7 Texas Ct. App. 363. The proof in such case may, however, be made by circumstantial evidence. *Wilson* v. *State*, 45 Texas, 76; *McMahon* v. *State*, 1 Texas Ct. App. 102, and other cases collated in Clark's Texas Crim. L., note 100, p. 259.

Because of error of the court in refusing to give the jury some appropriate instruction as indicated in the refused charge No. 2, and because of insufficiency of the evidence to support the verdict, the judgment will be reversed and the case remanded.

Reversed and remanded.

HARRIS CHILDRESS *v.* THE STATE.

THEFT — EVIDENCE.— The statements of an accused when first found in possession of property recently stolen are admissible in his behalf, but his statements after he has parted with the property, and when he has not the possession of it, are not. He cannot be permitted to fabricate evidence for himself by his own declarations.

APPEAL from the District Court of Milam. Tried below before the Hon. W. E. COLLARD.

The conviction was for the theft of a mare, and a term of five years in the penitentiary was the punishment assessed against the appellant. The pony referred to in the opinion was, according to the evidence, obtained by him in exchange for the mare, and was in his possession in Bastrop county when he was arrested there, ten days or two weeks after the mare was stolen in the county of Milam.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant being on trial charged with the theft of a mare belonging to one G. F. Davidson, alleged to have been stolen in Milam county on January 1, 1879, offered to prove, as is recited in bill of exceptions No. 1, by the witness John Childress, the declaration of the defendant that he was innocent and his explanation of the transaction concerning the mare and pony, made when the parties at witness' house first charged him with the theft of the mare, on the ground that declarations in defendant's favor which defendant made when found in possession of stolen property, said property being recently stolen, are competent in his behalf. The court refused the testimony, and the counsel excepted.

The judge refused to sign the bill of exceptions as presented, but appended thereto an explanation in the nature of a qualification to the effect that the court did allow the defendant to prove by his declarations from whom and how he got the pony, but, as he was not in possession of the mare, his declarations explaining how he got the mare were not thought to be admissible. The rule of law is that the property must be found in possession of the defendant before his explanation is admissible in his own behalf. *Cameron* v. *State*, 44 Texas, 652. He cannot prove his explanation made at the time of his arrest, ten days after he had disposed of the property. *Robinson* v. *State*, 3 Texas Ct. App. 487. Nor can he be permitted to fabricate evidence for himself, by his own declarations. *Dixon* v. *State*, 2 Texas Ct. App. 530; *Foster* v. *State*, 4 Texas Ct. App. 246; *Webb* v. *State*, 8 Texas Ct. App. 115. The court did not err in excluding the proffered evidence.

The matter set out in the second bill of exceptions relates to the action of the court in refusing the defendant's application for a continuance when first presented, and in refusing a new trial because of the matters set out in the application for continuance. Bill No. 3 relates to the refusal of the court to postpone the trial, in order to enable the defendant to search for certain witnesses. On a consideration of the materiality of the testimony sought to be obtained from the absent witnesses, in connection with the testimony adduced on the trial (the bill of exceptions does not set out the testimony on account of which a postponement was requested), we are of opinion the action of the court was proper under the circumstances disclosed. A careful consideration of the whole case discloses no error for which the verdict and judgment should be disturbed, and the judgment is affirmed.

Affirmed.

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TIM ERWIN *v.* THE STATE.

1. INSANITY — DELIRIUM TREMENS.— That delirium tremens is a species of insanity, and such as may render a party afflicted therewith incapable of the commission of crime, is no longer an open question.
2. CHARGE OF THE COURT.— The accused having set up as his defense that at the time of the alleged offense he was laboring under an attack of delirium tremens, and there being evidence before the jury tending to establish this defense, it was the duty of the court to give in charge pointedly and directly, the principles of law applicable thereto.
3. SAME.— See the opinion for a charge of the court held error, as being negative, and so general as to include every species of insanity.
4. SAME.— However slightly the evidence may tend to establish the defense interposed, it is the duty of the court to charge the law applicable to such defense.
5. SAME.— A charge of the court is error that makes the test of insanity depend upon whether the defendant knew right from wrong generally, instead of with respect to the act of which he is charged in the indictment.
6. SAME.— DELIRIUM TREMENS is usually the result of habitual use of intoxicants, but may also ensue from casual drunkenness.

APPEAL from the District Court of Tarrant. Tried below before the Hon. A. J. HOOD.

The indictment charged the appellant with an assault with intent to kill and murder W. T. Whitlow, in Tarrant county, Texas, on the 1st day of November, 1880. His trial resulted in his conviction of the offense charged against him, and two years in the penitentiary was the punishment awarded him.

The substance of the evidence for the prosecution was, that, on the morning of November 1st, 1880, at about 7 1-2 o'clock, Whitlow, the injured man, was standing in the door of a saloon in which he was employed, in Fort Worth, when he was approached by the appellant, who asked him for a drink of whiskey. Whitlow refused him the whiskey, telling him that he had drank enough. Continuing the conversation, Whitlow told him that if he did not quit drinking, he, Whitlow, would report him, and his dismissal from the night-watch force, on which he was employed, would follow. About this time Capt. Paddock came up and entered into a conversation with Whitlow. While Whitlow and Paddock were talking, the appellant asked Whitlow "Are you going to give me that drink?" to which question Whitlow answered "No!" Appellant drew his pistol, and said: "G-d d—n you, you have been back-cupping me all the time, and I'll give it to you now," and immediately fired, the ball striking Whitlow in the arm; from which wound he was confined to his bed for two weeks. Paddock started to appellant, but the latter presented his pistol and held him at bay. The city marshal approaching about this time, the appellant left, paying no attention to the marshal's order to halt. Two witnesses for the State testified that, while the appellant appeared to be drinking somewhat, he did not appear to be deprived of his reason, and in their opinion he knew what he was doing.

A number of witnesses for the defense testified that at the time of, and for some time previous to the shooting, the appellant had been drinking to great excess. They declared their belief in his insanity resulting therefrom, and that he did not know right from wrong at the time, nor what he was doing. Upon this testimony the appellant rested his defense.

Ball & McCart, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Erwin, the appellant, was convicted of the offense of assault with intent to murder. His defense was that he was insane at the time of the assault; that he was suffering under a species of insanity known as delirium tremens. The evidence raises the issue as to whether the defendant was at the time of the assault in a drunken frenzy, or laboring under the disease known as delirium tremens. If, therefore, delirium tremens is such imbecility of mind as will excuse the defendant, or, to speak more in accord with legal principle, defeat guilt, then it was the duty of the court below to charge the jury thereon in a clear and pointed manner.

That it is a species of insanity rendering the party incapable of the commission of crime, there is no longer any doubt. Messrs. Wharton & Stille, in their admirable work on Medical Jurisprudence, are very clear and emphatic on this point. They say: "If a man who, laboring under delirium tremens, kills another is made responsible, there is scarcely any species of insanity which, on like principles, would not be subjected to the severest penalties of criminal law." Wharton & Stille's Medical Jurisprudence, vol. 1, p. 202.

A party laboring under this species of insanity, not being responsible for his acts committed while thus diseased, and the evidence in this case tending to form this issue, it was the duty of the learned judge, in his charge, to have clearly and pertinently set forth the principles of law applicable to this defense. This was not done in that clear and distinct manner required by the now well-settled principles of law. *Burrell* v. *State,* 18 Texas, 713; *Marshall* v. *State,* 40 Texas, 200; *Lindsay* v. *State,* 1 Texas Ct. App. 327; *Lopez* v. *State,* 42 Texas, 298; *Sutton* v. *State,* 41 Texas, 513; *Miles* v. *State,* 1 Texas Ct. App. 510; *Pugh* v. *State,* 2 Texas Ct. App. 539; *Richardson* v. *State,* 7 Texas Ct. App. 486; *Francis* v. *State,* 7 Texas Ct. App. 501; *O'Connell* v. *State,* 18 Texas, 343; *Vincent* v. *State,* 9 Texas Ct. App. 203; *Whaley* v. *State,* 9 Texas Ct. App. 305; *Henry* v. *State,* 9 Texas Ct. App. 358.

The charge of the court upon the only issue in this case, that upon which the defendant relied for an acquittal, to wit, insanity, is as follows: "You are further instructed that where a defendant is accused of crime, placed on trial, and the plea of insanity is interposed, the inquiry the law requires in such cases is not as to the amount of intellectual capacity of the accused, or in other words, the law does not look to or inquire whether an accused party is possessed of a little or a great mind. It is the quality and not the quantity of the mind that the law looks to. If a man is in possession of a sound mind, has merely sufficient mental capacity to know right from wrong, to know and comprehend the nature and consequences of his own acts, the law holds such party accountable. On the other hand, a man may be in the possession ordinarily of that which would be termed a great mind, still if such person, during a period of actual insanity, violate the law, such person would in law not be a subject for punishment, and in such case it is in law immaterial what the cause of said insanity may have been. But in law insanity and mere drunkenness are two things distinct one from the other. While insanity exonerates from all punishment, mere drunkenness neither mitigates or justifies. If a man of his own volition voluntarily becomes drunk, and during a fit or spell of even very great intoxication, does an act, he cannot in such case plead drunkenness as an excuse. The law will not allow a sane man to shield himself from the consequences of his own acts on the ground that such sane man of his own accord and of his own will chose to become even beastly drunk. No mere temporary condition of the mind, brought about by a fit or mere spell of drunkenness, however great such drunkenness may be, is in law an exoneration or excuse for crime."

This charge, so far as the defense of the defendant is concerned, is negative in its character. There is no direct, affirmative application of the law to his theory of defense. It is true that the jury are told that if they believe that the defendant is *actually insane*, he would not be amenable. This is very general, including every species of insanity. The evidence tending, whether strongly or otherwise, to establish delirium tremens, the charge should have explained that species, and applied the legal principles thereto. This should have been done clearly, distinctly and affirmatively. Again, the charge makes the test of insanity depend upon whether the defendant knew right from wrong generally. The test is now settled to be whether the defendant knew the act charged to be wrong; if so, he is punishable.

There is another objection to the charge. It proceeds upon the idea that no temporary condition of the mind produced by drunkenness can avail. This is a correct assumption if delirium tremens can never result directly and immediately from drunkenness. This, however, is not the case. Though usually occurring in habitual drinkers after a few days' total abstinence from spirituous liquors, it may be the immediate effect. Wharton & Stille's Medical Jurisprudence, vol. 1, § 202; Ray's Med. Jur. 238.

For the errors above pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

Tom. Bostick v. The State.

1. **Evidence — Impeachment of Witness.** — There is no rule of law which requires that the question put to the impeaching witness shall be in the exact and precise language of that put to the witness sought to be impeached. If the predicate has been properly laid, it is sufficient if the question is germane and pertinent to the fact in regard to which the witness sought to be impeached had been questioned.
2. **Continuance.** — See the opinion for state of case wherein the defendant should have been awarded a postponement to procure the testimony of an absent witness, notwithstanding the desired testimony would have been cumulative.
3. **New Trial.** — The motion for a new trial was supported by an affidavit setting out that, immediately after the verdict was rendered against the defendant, the affiant saw the prosecuting witness take another witness who had testified for the State, aside, and secretly give her five dollars in money. This affidavit was not controverted either by the prosecuting witness or by the witness charged to have been bribed. *Held*, that the new trial asked should have been awarded.

Appeal from the District Court of Colorado. Tried below before the Hon. E. Lewis.

The opinion sufficiently discloses the case.

W. S. Delany, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Hurt, J. Bostick, the appellant, was convicted of arson, with ten years' confinement in the penitentiary assessed as punishment.

By one Foster, the State proved that the defendant was standing near the fire when it was first starting; that he did not cry "fire," and that in a short time he walked off up the street north, in the opposite direction from witness. This was the strongest, most pertinent and pointed evidence adduced against the defendant upon the trial. Upon cross-examination this witness was asked if she had not stated on the day following the fire, that she knew nothing of the origin of the fire. This she denied. The predicate was properly laid in every particular. An impeaching witness was introduced by defendant, and after his attention had been called to the time, place, and presence, he was asked "if he heard her (naming Foster) say anything about the origin of the fire at the time and place, and if so, what did she say?" To this counsel for the State objected upon the ground that the question was not a proper one, but that "*the question* put to the impeaching witness should be *directly* in the words of the question put to the witness sought to be impeached, and which she had denied." The court sustained the objection, and the defendant reserved his bill.

In this we think there was error. We are not aware of any rule of evidence which requires the question to the impeaching witness to be precisely in the same words of the question propounded to, and denied by, the witness sought to be impeached. This was certainly germane and pertinent to the fact in regard to which she had been interrogated, when laying the predicate for her impeachment. There was no objection to the predicate. The only objection was that the exact language of the first question was not used. The objection to this question was not well taken, and the court erred in sustaining it.

The defendant proved that, at the time of the alarm of fire, he was at his mother's house, which was about 800 yards from the fire. This proof was made by his mother, a colored woman. When the cause was called for trial, defendant moved the court to postpone the trial to a future time of the term, on account of the absence of Mrs. S. Smith, a white lady who lived about three miles from town. The motion showed that Mrs. Smith was detained at her home on account of the sickness of her infant child, which sickness the defendant stated to be temporary. The defendant expected to prove by Mrs.

Smith "that when the alarm of fire was given, it awakened her, witness, and she went to the house of this defendant's mother for protection, in which house defendant was living; that she lived just across the street from said house, and about 800 yards from the fire; that when she went into the room, this defendant's mother was there, and some one was lying on the floor asleep; that she asked defendant's mother who the person was, and she said it was "Tom," meaning defendant. Mrs. Smith had been subpœnaed, and there is no doubt that the sickness of her infant child was the cause of her non-attendance upon the court. Taken in connection with the other evidence, the facts sought to be established by her were material to the defense. It is true it is cumulative, but this fact had been sworn to by his mother. We will not attempt to disguise the fact that a witness occupying this position and relation will not be believed by the juries of the country as readily as when not so situated. We are of the opinion that the trial should have been postponed, especially when her evidence is read in contrast with that of the witness Foster.

There is another error which is fatal to the idea that the trial of defendant was without taint. In the motion for new trial the following affidavit is found: "B. F. Anderson, who being by me duly sworn, says: that, immediately after the verdict against defendant in the above case was brought in, he saw Wm. Munch (the prosecutor) take the witness Angelina Goodman aside, and secretly slip a five dollar bill into her hand, and said Munch had in his hand a considerable amount of money." By this witness, Angelina Goodman, the State proved that defendant had seriously threatened, not only to kill Munch, the owner of the house burned, but to burn him up in his house. In the counter-affidavits of Anderson, procured by the State, he corrects himself and states that the money was given to the witness who swore that the defendant was near the fire when it began, meaning evidently the witness Foster. The motion for new trial alleges that the witness had been bribed by Munch. Anderson's affidavit was filed to prove the charge. The money was given to the witness under very suspicious circumstances, and if not as a bribe, the State had it in her power to prove it. This was not done. Neither the affidavit of Foster nor Munch was procured. Again, if not a corrupt transaction, Munch would have sought—earnestly sought—the opportunity to either deny or explain this matter; for no honest man could rest contentedly under such a charge thus supported. If Munch was not informed of the charge, the county attorney was, and no person knew better the importance of proving the counter-affidavit of Munch than he did.

Taking all of the facts surrounding this transaction into consideration, we are not willing that this judgment should stand. We think the court should have granted the defendant a new trial. The judgment of the court below is reversed and the cause remanded for a new trial.

Reversed and remanded.

M. V. Collum *v.* The State.

1. **Adultery.**—By the Revised Penal Code the law of adultery has been materially changed, and the offense may now be committed in either of two modes: 1st, by the living together and having carnal intercourse with each other of a man and a woman of whom either is married to some other person; or, 2d, by "habitual carnal intercourse" of such parties with each other, without living together. The alterations are such as to necessitate corresponding changes in criminal pleadings, proofs, and instructions to juries, and many of the adjudications under the former law are now inapplicable and may mislead. See this case and the opinion *in extenso.*

2. Same — Pleading — Evidence.— It is not incumbent on the State to allege or prove the name of the person to whom one of the adulterers is married; and if the name be alleged the allegation is not a descriptive one, but is surplusage, and need not be proved.

3. Same — Charge of the Court.— When, as in the present case, the adultery if charged to have been committed by "habitual carnal intercourse," without cohabitation, it was error to so instruct the jury as to permit a conviction without proof that the carnal intercourse was "habitual." The phrase "habitual carnal intercourse," however, is a familiar and untechnical expression, and there is no need to explain it by instructions.

Appeal from the County Court of Navarro. Tried below before the Hon. R. C. Beale, County Judge.

The indictment charged the appellant and one Mrs. Mary Wiley with the crime of adultery, alleging habitual carnal intercourse for one year prior to June 1, 1880. Having obtained a severance from his co-defendant, the appellant was tried on the 10th day of March, 1881, convicted, and his punishment assessed at a fine of $100.

Pat Nolan was the first and the main witness for the State. He testified in substance that he occupied a room in the house occupied by Mrs. Wiley in the town of Corsicana, and on more than half a dozen occasions saw the appellant and Mrs. Wiley lying on the bed in Mrs. Wiley's room together. Ordinarily on such occasions Mrs. Wiley would remove the candle from her room, and place it on the table in the adjoining room of the witness. He had often heard them on the bed together at night, talking, but in a voice so low that he could not understand what was said. The witness knew that subsequent to these transactions, and after Mrs. Wiley had moved to Mr. Melton's, she gave birth to a child.

The testimony of Mr. and Mrs. Melton was substantially the same and to the effect that upon the recommendation of the appellant, they employed Mrs. Wiley and Pat Nolan to help them work their crop out of the grass. Nolan stayed with them about one week. Mrs. Wiley remained with them in their house for about six weeks, doing sewing — some sewing for the appellant. At the end of six weeks she moved into a cabin in the yard, rented for her by the appellant. The appellant visited their house as ordinary neighbors visited, but did not call for Mrs. Wiley though she frequently came in the room during his visits. Mrs. Wiley was in the habit of taking walks, but the witness did not know that on any of these walks she met the appellant. Mrs. Wiley had a bastard child while occupying the cabin, and the appellant at the time of her confinement promised to pay Mrs. Melton if she would wait on her. Appellant was naturally a kind-hearted man and had previously aided the poor. Mrs. Wiley was a poor woman. Appellant had frequently played with and fondled the child after its birth, and asked if it was not a fine child.

Eugene and Simon Collum, sons of the defendant, testified for their father, assailing the reputation of Pat Nolan for truth and veracity. They testified that their father had often given to the poor, both money and provisions, when he could ill afford to do so.

Read & Read, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. By a careful comparison of the law of adultery at present in force with the provisions of the Penal Code in force prior to the last revision, it will be seen that material changes have been introduced by that revision. Not the least in importance is the change in the law in defining the offense itself, which, by the present law, is thus defined: "Adultery is the living together and carnal intercourse with each other, *or habitual carnal intercourse* with each other without living together, of a man and a woman, when either is lawfully married to some other person." Penal Code, art. 333.

The change in the law must be borne in mind in trials for this offense where, as in the present case, the offense is alleged to have been committed since the last revision of the Code went into operation. Especially should these changes be carefully observed in the preparation of indictments or informations, and in the charge of the court as to what the proof must show in order to warrant a conviction. By a careful reading of the article of the Penal Code, which defines the offense, it will be seen that the crime of adultery may be committed in either one of the two modes mentioned in the article above set out, the two modes being separated by the disjunctive *or* found in the article quoted. That is, when a man and a woman, either of whom is lawfully married to some other person, *shall live together and have carnal intercourse with each other*, both the man and the woman would be guilty of the offense, though only one of them be married to some other person. Penal Code, art. 335.

Likewise, in other words, *or* when the man and the woman shall have *habitual carnal intercourse with each other*, without living together, the other essentials as to the marriage of one of the parties to some other person being present. It was a part of the law prior to the revision, on the subject of the proof of the crime, that it was sufficient to prove that the parties cohabited together, and the like. See old Penal Code, art. 393. Whereas by the present Code the whole offense is embraced in the definition, and the article of the former Code is omitted entirely by the revision. From the language employed we think it manifest that more is required to be alleged, and, consequently, further evidence is required by the revision than by the former law on the subject, and hence we conclude that adjudications under the old law cannot furnish a safe and sufficient guide in the administration of the present law, so far as the changes are concerned, and especially must this be the case when the change, as to the proof, is so manifest.

To apply these conclusions to the present case, the indictment does not charge the parties with living together, but does charge that they did "unlawfully and habitually have carnal intercourse with each other," with proper averment as to one of the parties being married to some other person. The indictment, in charging the marriage of one of the parties upon whom adultery is charged, descends into what we deem unnecessary particularity, by alleging or attempting to set out the name of the other person to whom the adulterer was married.

In our opinion it would be sufficient to allege in the indictment the lawful marriage to some other person, as set out in the statute, and the law only demands that proof be made that the party was lawfully married to some other person than the one with whom the adultery is charged, and it is not incumbent on the prosecution to either allege or prove the name of the other person to whom one of the parties was lawfully married. We therefore conclude that the question raised on the subject of the testimony of the name of this other person was wholly unimportant and immaterial, and an unnecessary consumption of time; this portion of the indictment, not being necessary to the description of the offense, might properly be treated as surplusage. This ruling would not, of course, apply to a descriptive averment as to the subject of the crime. In such case, the description or allegation must be proved, though it be pleaded with greater particularity than necessary.

The charge of the court was a substantial compliance with the construction given by this court to the laws in force prior to the revision, but omitted to notice the important changes made in the revision, in that it gave the jury an instruction as to what proof would warrant a conviction, which, whilst correct with reference to the former law, as held by this court (*Swancoat* v. *State*, 4 Texas Ct. App. 105, and in *Parks* v. *State*, Id. 134, which were decided under the former law), was defective in that it did not instruct the jury that the carnal intercourse between the parties must be shown by the testimony to have been habitual, that being the kind of carnal intercourse the law condemns, and the kind with which the parties are charged in the indictment. We make no ruling as to what the indictment should allege, or what the State would be required to prove under a charge such as is defined in the first clause of the article quoted above, this not being involved in the present case.

The word "habitual," as employed in the Code, is not one of technical signification, but one to be understood as it is used in common acceptation, and hence needs no explanation by the charge of the court. The jury must be held competent to understand what is meant by the language in common use, and what is meant by the expression *habitual carnal intercourse.* We are, therefore, of opinion that the court did not err in refusing the special charge asked by the defendant's counsel explaining what the word habitual, or habitual carnal intercourse, signifies. We are of opinion, however, that the requested instruction was sufficient to call the attention of the court to the language employed in the statute which defines the offense, and to the fact that this feature had been omitted and overlooked in the charge, and that the error was one into which the court was doubtless led, in a measure, by rulings made by this court under former statutes. Still it was not the law of this case, by reason of the changes made in the law since these decisions were rendered. As there are several important changes made in the former laws by the revision, it may not be amiss to invite the attention of all concerned to these changes. The old law will be found in the old Penal Code, arts.

392–5; Pas. Dig. arts. 2022–5. The law now in force is found in the Revised Penal Code, arts. 333–6. The charge of the court gave the jury a latitude against the defendant and to his prejudice not warranted by the present law, for which the judgment will be reversed and a new trial awarded.

Reversed and remanded.

INDEX.

A.

ACCOMPLICE TESTIMONY.

1. Note in the opinion the charge to the jury on the subject of the testimony of an accomplice and its corroboration, and which is sustained by this court. *Avery* v. *State*, 199.

2. If the inculpatory evidence consists of or substantially depends upon the uncorroborated testimony of a State's witness, and he is shown to have been an accomplice in the perpetration of the offense, a conviction cannot legally be had. And a reasonable doubt as to the complicity of the witness operates the same effect. *Dubose* v. *State*, 230.

3. The defense is not confined to positive or direct evidence of the complicity of the State's witness, but may establish it by any character of evidence which would be admissible if the witness himself were on trial for the offense. *Id.*

4. In a trial for murder the inculpatory evidence was circumstantial, except the testimony of a State's witness against whom there was some proof of complicity, and the contested issue was the identification of the defendant as the assassin. He proposed to prove that the State's witness was at enmity with the deceased, had threatened his life, and carried weapons for him; but, on objection, the proof was excluded. *Held*, that the proposed proof was competent in this state of case, and its exclusion was error. Otherwise, however, had it not proximately tended to exculpate the defendant, and thus distinguished the case from *Boothe* v. *State*, 4 Texas Ct. App. 202, and others in which the proof only tended to show malice of the third party against the deceased. See the opinion *in extenso* on the question. *Id.*

5. The corroboration of an accomplice required by law in order to warrant a conviction upon his testimony must tend pertinently to connect the accused with the offense. Corroboration as to matter having no tendency in this direction, however thorough and complete, will not suffice. See the opinion *in extenso* on the subject. *Weldon* v. *State*, 400.

6. In the trial of a man for adultery, the testimony of his paramour as a State's witness is that of an accomplice or *particeps*

ACCOMPLICE TESTIMONY — continued.

criminis, and will not support his conviction unless corroborated by other evidence tending to connect him with the offense. *Merritt* v. *State*, 402.

7. Proof of the guilty possession or connection of the accused with the fruits of a theft may be evidence strongly corroborative of the inculpatory testimony of an accomplice. *Jernigan* v. *State*, 546.

8. The acceptance by the accused from a confessed accomplice of a sum of money, imputedly the proceeds of the sale of the stolen property, being a fact relied upon to corroborate the accomplice, it must appear, first, that the money received was in fact proceeds of the sale of the stolen property, and, second, that the accused was not only informed of that fact, but also that the property was stolen; otherwise the possession of the money is not a corroborative circumstance. *Id.*

9. Accomplices in crime cannot corroborate each other, nor can an accomplice testify to one fact and corroborate this by testifying to another. *Id.*

10. To be corroborative, the fact must not only be criminative, but must be shown by the oath of a witness other than the accomplice. If it is so testified to, and tends to connect the accused with the offense, it is corroborative, whether testified to by the accomplice or not. *Id.*

ADULT.

See AGGRAVATED ASSAULT, 2.

ADULTERY.

1. Adultery, as defined by the Penal Code, art. 333, is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person. The other essentials being present, the crime of adultery depends upon either of two circumstances: (1) The living together and carnal intercourse with each other, or (2) habitual carnal intercourse without the living together. *Edwards* v. *State*, 25.

2. Indictment which merely charges that the parties "did then and there unlawfully cohabit together and carnally know each other," is insufficient to charge adultery. See the opinion for charging clause set out and *held* bad. *Id.*

3. See evidence *held* insufficient in a trial for adultery to corroborate the testimony of the defendant's paramour. *Merritt* v. *State*, 402.

4. By the Revised Penal Code the law of adultery has been materially changed, and the offense may now be committed in either of two modes: 1st, by the living together and having

ADULTERY — continued.

carnal intercourse with each other of a man and a woman of whom either is married to some other person; or, 2d, by "habitual carnal intercourse" of such parties with each other, without living together. The alterations are such as to necessitate corresponding changes in criminal pleadings, proofs, and instructions to juries, and many of the adjudications under the former law are now inapplicable and may mislead. See this case and the opinion *in extenso*. *Collum* v. *State*, 708.

5. It is not incumbent on the State to allege or prove the name of the person to whom one of the adulterers is married; and if the name be alleged the allegation is not a descriptive one, but is surplusage, and need not be proved. *Id.*

6. When, as in the present case, the adultery is charged to have been committed by "habitual carnal intercourse," without cohabitation, it was error to so instruct the jury as to permit a conviction without proof that the carnal intercourse was "habitual." The phrase "habitual carnal intercourse," however, is a familiar and untechnical expression, and there is no need to explain it by instructions. *Id.*

AGGRAVATED ASSAULT.

1. While an information or indictment for aggravated assault must charge the particular circumstance of aggravation relied upon, it need not charge the offense in so many words to be an "*aggravated assault.*" See the opinion for an information for this offense *held* sufficient. *Meier* v. *State*, 39.

2. The word "adult" as used in art. 496 of the Penal Code signifies a person who has attained the full age of twenty-one years. *Schenault* v. *State*, 410.

3. To sustain a prosecution for aggravated assault, the State relied upon the fifth clause of art. 496 as to the cause of aggravation. The defense asked the court to charge the jury that if they believed from the evidence that the accused was under twenty-one years old they must acquit of aggravated assault. The accused's age was admitted to be eighteen years, but the court refused to give the charge asked. *Held*, error. *Id.*

AFFIDAVIT.

See APPEAL, 1.
NEW TRIAL, 6.

An affidavit of a person who had been convicted of a felony, and who, unpardoned, had served a term in the penitentiary, is incompetent as the basis of a criminal prosecution. *Rivers* v. *State*, 177.

ALIBI.

See MURDER, 6.

When the defense relied upon is *alibi*, it is the duty of the

ALIBI — continued.

court to explain its nature and character to the jury. *McGrew* v. *State*, 539.

ALLEGATA ET PROBATA.

See EVIDENCE, 49.

VARIANCE.

1. An averment in an indictment for infanticide that the deceased infant was a female is of that class of averments known as descriptive, and it was incumbent on the State to prove it. *Wallace* v. *State*, 255.

2. It is not incumbent on the State to allege or prove the name of the person to whom one of the adulterers is married; and if the name be alleged the allegation is not a descriptive one, but is surplusage, and need not be proved. *Collum* v. *State*, 708.

AMENDMENT.

See PRACTICE, 17.

PRACTICE IN COURT OF APPEALS, 11.

1. When, as in this case, the defect in the indictment is matter of substance, the indictment is not amendable, and the prosecution will be dismissed. *Edwards* v. *State*, 25.

2. After an appeal has been perfected, jurisdiction of the case passes out of the trial court and attaches to this court, and hence any attempted correction of the record by the court below after appeal has been perfected, cannot be considered by this court for any purpose whatever. *Gerard* v. *State*, 690.

APPEAL.

1. From a final judgment for $20 or more, rendered on a recognizance or bail bond, an appeal may be taken or a writ of error sued out *in forma pauperis;* but in such case it is indispensable that the requirements of article 1401 of the Revised Statutes be complied with by making the "strict proof" therein prescribed. Affidavit that the appellant is "unable to give security for the costs of appeal" is not a compliance with those requirements, and is insufficient. *Currie* v. *State*, 90.

2. See the opinion for a collocation of the statutory provisions which regulate appeals and writs of error *in forma pauperis* from judgments on recognizances, bail bonds, and bonds taken for the prevention or suppression of offenses. *Id.*

3. If, after conviction, and pending the disposition of his appeal to this court, the accused effects his escape, this court is ousted of jurisdiction of such appeal, and jurisdiction can be re-invested only by the voluntary return and surrender of the accused within ten days. *Lunsford* v. *State*, 118.

ARREST.

1. Arrest without warrant is authorized by statute when, (1), the offense being a felony, or an offense against the public peace, it is committed in the presence or view of the officer; (2), when the offense, being a felony or breach of the peace, is committed in the presence or view of a magistrate, and he verbally orders the officer to arrest; and (3), when it is shown by satisfactory proof to the peace officer, by the representation of a credible person, that a felony has been committed, and that the offender is about to escape so that there is no time to procure a warrant. *Ross* v. *State*, 455.

2. An attempted unlawful arrest is deemed in law a provocation sufficient to reduce a killing in resisting it from murder to manslaughter. *Id.*

ASSAULT.

See AGGRAVATED ASSAULT.
ASSAULT WITH INTENT TO MURDER.
FACT CASES, 15.

1. On trial of an indictment or information for aggravated assault a conviction may yet be had for simple assault, notwithstanding the Revised Penal Code omits the provision of the original Code which expressly authorized such convictions. Pasch. Dig. art. 2152. *Harrison* v. *State*, 93.

2. Under article 489 of the Revised Penal Code an assault may be committed by "the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object." *Held*, that the ability to commit a battery need not be shown in order to constitute or prove such an assault. (*McKay* v. *State*, 44 Texas, 43, and *Jarnigan* v. *State*, 6 Texas Ct. App. 465, were cases decided before the enactment of the Revised Codes.) *Kief* v. *State*, 286.

3. To constitute an assault and battery, the intent to injure must concur with the use of unlawful violence upon the person of the assaulted party; but the slightest degree of force suffices to constitute the violence, and the intended injury may be to the feelings or the mind of the latter as well as to the corporeal person. If such injury would be the natural consequence of the violence used, the unlawful intent is presumed unless the presumption is repelled by the evidence. *Donaldson* v. *State*, 307.

4. If in a prosecution for assault and battery the intent imputed to the accused was to injure the mind or the feelings of the assaulted party, the evidence germane to the existence of the intent may well involve the character of the assaulted party, and the surrounding circumstances:—*e. g.*, if the battery consisted in manipulating a woman without her consent, and the intent imputed was

ASSAULT — continued.

to obtain sexual knowledge of her, proof of previous illicit intercourse between the parties, or evidence that she was a public prostitute, is legitimate for the defense as tending to disprove the imputed intent, and thus bearing directly on the issue. *Id.*

5. In the case above indicated the defense was entitled to require the woman herself, though married, to answer whether there had been acts of sexual intercourse between her and the defendant prior to the alleged assault. *Id.*

ASSAULT WITH INTENT TO MURDER.

A husband being prosecuted for an assault with intent to murder his wife, and the evidence of the wife tending to show that his anger was aroused by the presence with her of an unknown man two days before the alleged assault, the defense offered to prove that some twenty days previous she had been surprised in an act of criminal intimacy with the unknown man, and that defendant was apprised of that fact. *Held*, that under the peculiar facts of this case, the exclusion of the proffered testimony was error. But it was not error to exclude proof of her general reputation for lewdness. *Greta* v. *State*, 86.

B.

BAIL BOND.

See RECOGNIZANCE.

1. One W., who was confined in the G. county jail, under a *mittimus* from the District Court of C. county, was allowed bail and gave the required bond with sureties approved by the sheriff of G. county, who accepted the bond and sent it to the clerk of said court, as directed by the order allowing the bail. Meanwhile the said sheriff had received a *capias* from the District Court of B. county for the arrest of W. to answer a different charge there pending, and without setting W. at large, arrested and detained him by virtue of the *capias* until the sheriff of B. county conveyed him to the jail of that county, and he subsequently escaped therefrom. At the next term of the District Court of L. county, to which the venue had been changed, W. failed to appear, and judgment *nisi* was entered against him and his sureties on the bond; and in defense to the *scire facias*, the sureties pleaded that the bond had never become operative or binding, because their principal had not been set at liberty or placed in their custody, but was continuously detained by the State until he made his escape. But *held*, that the plea sets up no defense. Inasmuch as the bail bond took effect from its delivery and acceptance, and W. was not thereafter detained by virtue of the *mittimus* from C. county, but by virtue of the *capias*

BAIL BOND — continued.

from B. county, and inasmuch as he was not in custody at all when he forfeited his bond, his arrest and detention by virtue of the *capias* had no effect on the validity of the bond or the liability of the sureties. The case would be different if, notwithstanding the allowance of bail and acceptance of the bond, W. had been held in custody under the *mittimus* from C. county, or if, at the time the bond was forfeited, the State prevented his appearance by detaining him on any charge, or if the sureties had surrendered him, as they could have done notwithstanding his detention on the *capias*. *Stafford* v. *State*, 46.

2. By the former Code of Criminal Procedure (Pasch. Dig. art. 2748), a sheriff was prohibited from taking bail in a felony case "during the term of the court," and was required to take the accused before the court, to enter into recognizance. *Held*, that this article applied only to cases pending in the District Court, and not to cases of which it had not by indictment or otherwise acquired jurisdiction or cognizance. The Revised Code of Procedure, in article 304, contains a more explicit provision to the same effect. *Peters* v. *State*, 302.

3. Being committed by a justice of the peace on a charge of bailable felony, the bail of the accused was fixed by the justice at $1,000, but subsequently the State's counsel and the accused agreed that the sheriff should release the accused on a bond for $500; which being executed by the present appellants, the accused was released. In defense to *scire facias* on the forfeiture of the bond the appellants contend that it was void because taken by the sheriff in a sum different from that fixed by the justice. But *held* that appellants are estopped. Note the distinction between this case and those of *Barringer* v. *State*, 27 Texas, 553, and *Neblett* v. *State*, 6 Texas Ct. App. 316. Such agreements, however, are highly reprehensible on the part of officials representing the State, and especially so on the part of the officer having the custody of the accused. *Id.*

4. It is not sufficient that a bail bond describe some offense against the laws of this State. It must describe the one of which the principal obligor stands charged. *McAdams* v. *State*, 317.

5. The indictment charged the theft of certain cattle, the property of "J. P. and A. C." The bail bond described them as the property of J. P. *Held*, a fatal variance. *Id.*

6. A sheriff making an arrest for misdemeanor under a *capias* is authorized to take bail of the accused either in term-time or in vacation of the court. *Ellis* v. *State*, 324.

7. Judgment final on forfeiture of bail is erroneously entered when it appears that judgment *nisi* was not entered against the principal. *Id.*

BILLS OF EXCEPTIONS.

1. The Code of Procedure, article 686, provides for the allowance of bills of exception in criminal actions, and requires the judge's signature thereto, "under the rules prescribed in civil suits." Note in the opinion the collocation of new regulations adopted in the revision of the Civil Statutes, and which are also applicable to criminal cases. *McDow* v. *State*, 98.

2. Note suggestions of this court as to what matter should be embraced in bills of exception reserved to the rulings of the court below on the evidence. *Wright* v. *State*, 476.

3. An unauthenticated bill of exceptions will not be considered by this court for any purpose whatever. *Hill* v. *State*, 673.

4. Bills of exception, to be considered for any purpose on appeal, must be prepared and certified during the term of the trial court at which they are taken. But, if the trial court, by special order entered of record during the term, allows the statement of facts to be prepared and filed within ten days after the adjournment, as it may now do, exceptions to evidence admitted over objection may be embodied in it. See the opinion for a collocation of the Rules of Court and statutory provisions which control this matter. *Keeton* v. *State*, 686.

BURDEN OF PROOF.

See INDICTMENT, 14.

1. The jury were instructed that "in every criminal prosecution the accused is presumed innocent until his guilt is established by legal evidence, and the burden of proof rests upon the State and does not shift till the State has proved, to the satisfaction of the jury, the facts which constitute the offense charged; and when this is done it devolves upon the accused to establish the facts upon which he relies to excuse or justify the prohibited act." *Held* erroneous because it in effect shifts the burden of proof and requires that the defendant shall, on his plea of not guilty, prove his innocence. *Dubose* v. *State*, 230.

2. When no special plea or independent exculpatory fact is relied on by the accused, and he confines his defense to a traverse of the issues tendered in the indictment, the burden of proof never devolves on him. *Id.*

BUTCHERS.

Article 756, Penal Code, by which any butcher failing to report the animals he slaughtered is subject to fine, defines a substantive offense, not limited by or dependent on any other enactment, and is a general law in force throughout the State. There is no repugnancy between it and article 4565 of the Civil Statutes, which shows the kind of a report required of butchers under the penalty prescribed by said article 756. *Dreyer* v. *State*, 97.

C.

CARRYING WEAPONS.

1. To a prosecution for unlawfully carrying a pistol about his person, the defendant set up the defense that he was a traveler, and as such was expressly exempt from the penalties denounced against persons carrying prohibited weapons. The evidence showed that the defendant, when arrested in C. county, was *en route* with a herd of cattle from another county to a market in Kansas, and progressed about ten miles per day. *Held*, that he was a traveler within the spirit and meaning of article 319, Penal Code. *Rice* v. *State*, 288.

2. An indictment which purported to charge the appellant with carrying a pistol into a public assembly was quashed for that offense, but was sustained for the simple carrying of a pistol. *Held*, that, as the indictment contains all necessary allegations to charge the latter offense, there was no error to appellant's prejudice in the ruling of the trial court. *Pickett* v. *State*, 290.

3. Indictment for carrying a pistol need not allege that it was "unlawfully" carried. The phraseology of the statute suffices. *Id.*

4. See evidence held insufficient to sustain a conviction for unlawfully carrying a pistol. *Smith* v. *State*, 420.

CASES OVERRULED.

Watson v. *The State*, 9 Texas Ct. App., 212, overruled on question of jurisdiction, by *Hatch* v. *State*, 515.

CHANGE OF VENUE.

See PRACTICE, 3.

CHARGE OF THE COURT.

1. If exception was not taken to an erroneous charge when it was delivered, the error is not cause for reversal unless it was calculated to prejudice the rights of the appellant. The relevancy of the charge to the evidence adduced cannot be considered by this court when the record fails to bring up the facts in proof. *Williams* v. *State*, 8.

2. The court below instructed the jury to the effect that they were the judges of the credence due to an impeaching witness as well as the others, and should believe such of the witnesses as they thought most entitled to credit. No exception was taken to the instruction when it was given, and there is no statement of facts. *Held*, that the instruction was not a charge on the weight of evidence, nor ostensibly calculated to prejudice the rights of the defendant. Such efforts, however, to aid the reasoning faculties of the jury, are always unnecessary, and are frequently calculated to prejudice the defendant's rights; and the better practice is to eschew them. *Id.*

CHARGE OF THE COURT—continued.

3. An instruction to the effect that the jury should reconcile conflicts in the evidence, if practicable to do so, and, if not, should give credence to the witnesses they deem most entitled to belief, is superfluous, but not ostensibly on the weight of evidence or otherwise violative of the Code of Procedure. *Means* v. *State*, 16.

4. If, after having charged the general principles of law and the statutory definitions of the offense, the court makes a direct application of the law to the evidence in the case, the charge is not amenable to the objection that it states merely abstract propositions of law. *Davis* v. *State*, 31.

5. The charge of the court must give to the jury instructions applicable to every legitimate conclusion which can be deduced from the evidence, and if there be conflicting theories of the State and defendant, supported by any evidence, they must be presented clearly and pertinently by the charge. *Id.*

6. Note suggestions to trial judges of the danger of invading the powers of the jury by transcending in their charges the language of the Code respecting the relations of the jury to the evidence adduced. *Armendares* v. *State*, 44.

7. Information charged the offense of pursuing the occupation of selling medicated bitters, etc.; but the trial court instructed the jury that the prosecution was for "selling medicated bitters," etc. *Held*, that the instruction misdirected the jury as to the accusation against the defendants, and was therefore essentially erroneous. *Viser & Carson* v. *State*, 86.

8. In order to hold a person liable with others as a principal in the commission of an offense, there must be a combination of both act and intent. See the opinion for a charge on the question *held* to be erroneous. *Rountree* v. *State*, 110.

9. Whether asked or not, the court must, in felony cases, by a proper charge apply the law to every conclusion legitimately deducible from the evidence. If there is any evidence tending to establish a defense, the defendant is entitled to a charge directly upon the point, no matter what may be the view of the court on the weight and value of the testimony; and a charge composed of statutory definitions generally applied will not suffice. *Scott* v. *State*, 112.

10. A charge of the court that in effect instructs the jury that they must not look to other evidence in the case if they believe the testimony of a witness to certain confessions of the defendant, is erroneous as being directly upon the weight of evidence. *Stephens* v. *State*, 120.

11. A conviction for theft of certain oxen was had upon evidence from which the jury might have inferred that, though the defendant killed the oxen without their owner's consent, and afterwards skinned them and appropriated the hides, yet that he killed them

CHARGE OF THE COURT—continued.

because they were depredating on his crop, and with no intent to appropriate them or any part of them. *Held*, that the trial court should have distinctly instructed the jury that, in case they so found the facts to be, the defendant was not guilty of theft of the oxen. It was not sufficient to instruct that such a state of facts would warrant a conviction for the misdemeanor of killing live stock without the owner's consent, etc. *McPhail* v. *State*, 128.

12. In the trial of a defendant on an indictment which charges him as an accomplice, it is competent for the state to prove confessions of the principal offender, for the sole purpose of establishing the latter's guilt; but the jury should be instructed that the confession is not evidence against the defendant for any other purpose. *Simms* v. *State*, 131.

13. A charge must be taken and construed as a whole, and if as a whole it is correct, no detached portion, unless in and of itself sufficient or calculated seriously to mislead, or liable to grave misconstruction, will require a reversal of the case. *Hudson* v. *State*, 215.

14. The jury were instructed that "in every criminal prosecution the accused is presumed innocent until his guilt is established by legal evidence, and the burden of proof rests upon the State and does not shift till the State has proved, to the satisfaction of the jury, the facts which constitute the offense charged; and when this is done it devolves upon the accused to establish the facts upon which he relies to excuse or justify the prohibited act." *Held* erroneous because it in effect shifts the burden of proof and requires that the defendant shall, on his plea of not guilty, prove his innocence. *Dubose* v. *State*, 230.

15. Where the guilt of the accused is dependent solely upon circumstantial evidence, it is the duty of the court to apply, in its charge, the law applicable to such evidence, whether so requested or not. *Ward* v. *State*, 293.

16. The material questions of fact in this case being whether or not the sheep of the appellant were infected with "scab," and whether or not the appellant violated the act in relation thereto, the charge of the court should have submitted these issues to the jury. *Troy* v. *State*, 319.

17. It is incumbent on the State to prove an offense not barred by limitation, but, when nothing in the evidence raises a doubt whether the prosecution was barred, there is no occasion for instructions to the jury on the subject. *Vincent* v. *State*, 330.

18. If in a murder case there be evidence which, however inconclusively, tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury; and it should be given affirmatively, directly, and pertinently to the theory of the case in-

CHARGE OF THE COURT—continued.

dicated by such evidence. Mere negative or abstract propositions are not sufficient. *McLaughlin* v. *State*, 340.

19. In a trial for murder the theory of the defense was that the deceased and one F. had conspired to kill the defendant, and were present and co-operating to that end when he killed the deceased in self-defense. There was evidence tending to prove the presence and concerted action of the deceased and F., but whether the defendant knew that fact or was cognizant of a conspiracy to kill him was determinable only from the circumstances surrounding the parties at the time of the killing. *Held*, that the charge to the jury should not have ignored the participancy of F., or have conditioned the defendant's right of self-defense on the hostile demonstrations of the deceased alone, but should have recognized the right of the defendant to kill either the deceased or F. if it reasonably appeared to him that they were then present and acting together to take his life. *Id.*

20. It is made the imperative duty of the court in felony cases, to charge the law and all of the law applicable to every conclusion which may be legitimately deduced from the evidence. *Elliston* v. *State*, 361.

21. Though it was the duty of the accused to ask an appropriate instruction, his failure to do so will not preclude a reversal by this court when it appears that the omitted instruction was law applicable to some of the facts in proof, and that its omission was prejudicial to the rights of the accused. *Id.*

22. Refusal of an instruction which directs the attention of the court to a proper issue, with proper modifications demanded by the case as made by the evidence, is error. See this case for example. *White* v. *State*, 381.

23. To sustain a prosecution for aggravated assault, the State relied upon the fifth clause of art. 496 as to the cause of aggravation. The defense asked the court to charge the jury that if they believed from the evidence that the accused was under twenty-one years old they must acquit of aggravated assault. The accused's age was admitted to be eighteen years, but the court refused to give the charge asked. *Held*, error. *Schenault* v. *State*, 410.

24. When there is no evidence tending to prove a lower grade of offense than that charged in the indictment, the court may well decline to instruct upon such lower grade; but, on the other hand, the instructions given to the jury should never in effect withdraw from them the issue of guilty or not guilty. *Eanes* v. *State*, 421.

25. When necessary, as it often is, that the jury be instructed on the doctrine of reasonable doubt as between the degrees of the offense charged, the instruction should be expressed in language comprehensible to non-professional men. *Id.*

CHARGE OF THE COURT—continued.

26. If the court assumes and charges on a theory not raised or indicated by the evidence, it is radical error, and fatal to a conviction. *Ross* v. *State*, 455.

27. The accused was indicted under art. 679 of the Penal Code for the wilful killing of a cow. In the charge the court embraced all of the animals and birds named in the Code. While this court does not hold such error sufficient for reversal, the propriety of confining the charge to the animal named in the indictment is suggested. *Haynes* v. *State*, 480.

28. After charging that, to convict, the jury must believe the defendant guilty beyond a reasonable doubt, the court further charged: * * * "if you believe from the evidence, beyond a reasonable doubt, that the defendant is not guilty as charged in the indictment, you will simply say so in your verdict." *Held*, error as requiring the jury to believe the defendant's innocence beyond a reasonable doubt, before they could acquit him. Such a charge is fundamentally erroneous, though neither bill of exception nor statement of facts is brought up in the record. *Id.*

29. Article 783 of the Code of Criminal Procedure inhibits, in an argument upon a second trial, any allusion to a former conviction, but does not prohibit a reference in the charge of the court to a former acquittal of higher grades of the offense charged in the indictment. It was not error, therefore, for the District Judge, in his charge to the jury on the second trial of a defendant charged with murder, to state that the defendant had been acquitted of murder in the first degree, and that, therefore, there was no occasion for him to explain to the jury the difference between the two degrees of malice. In such cases it is proper for the judge to instruct the jury, in appropriate language, that they should not consider the subject of murder in the first degree. *Pharr* v. *State*, 485.

30. The italicising or underscoring of the word "unlawfully" in a charge of the court on a case of murder affords the accused no ground of complaint. The killing to be criminal must be unlawful, and this cannot be too pointedly called to the attention of the jury. *Id.*

31. If the court in a misdemeanor trial gives an erroneous charge in writing, exception must be reserved, otherwise the error, unless fundamental, is not cause for reversal. *Willis* v. *State*, 498.

32. Charge of the court in a trial for felony is defective if it omits to apply the law governing every phase of case indicated by the evidence. The omission to apply the law to a single exculpatory theory raised by the evidence is cause for a reversal of the conviction. *Lawrence* v. *State*, 495.

33. See the opinion in this case *in extenso* for a review of the

CHARGE OF THE COURT — continued.

adjudications in this State upon the question whether and how far it is incumbent on the trial courts, in cases dependent on circumstantial evidence alone, to give in charge to the jury, as part of the law of the case, the legal principles formulated and known as the "rule in Webster's case." *Barr* v. *State*, 507.

34. Note instructions which are held to be defective and insufficient in the present case. *Id.*

35. The doctrine of reasonable doubt applies to the general issue of guilty or not guilty, and it was not error to refuse a special instruction which attempted to apply it to each and every fact in proof. *Id.*

36. See the opinion *in extenso* for a charge upon manslaughter requested by the defendant, but properly refused because the charge was not warranted by the evidence. *Williams* v. *State*, 528.

37. However slightly an insufficient or erroneous charge of the court may tend to injure the rights of the defendant, it is cause for reversal if excepted to at the proper time. *McGrew* v. *State*, 539.

38. When the defense relied upon is *alibi*, it is the duty of the court to explain its nature and character to the jury. *Id.*

39. Charge of the court instructed the jury, * * * "Recent possession or participation in the fruits of the crime are circumstances which the jury may consider, in connection with the whole evidence, in determining the guilty agency in its commission." *Held*, correct as an abstract proposition of law, but, in view of the evidence in this case, error, as assuming as proved a material fact at issue. *Jernigan* v. *State*, 546.

40. In a prosecution for rape alleged to have been effected by means of "force and threats," the charge of the court is insufficient unless in defining "force" it defines it as "such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case." *Jones* v. *State*, 552.

41. When the rape is alleged to have been effected by means of "threats," the jury should be instructed that the threats used "must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case." *Id.*

42. See the opinion for a charge of the court on circumstantial evidence held correct. *Campbell* v. *State*, 560.

43. See the opinion *in extenso* for a charge upon circumstantial evidence *held* to be a charge upon the weight of evidence, but which, being neither excepted to by the defendant nor operating to his prejudice, constitutes no cause for reversal. *Post* v. *State*, 579.

44. A charge upon the weight of evidence is not necessarily ground for reversal, unless it appears by bill of exceptions that it

CHARGE OF THE COURT — continued.

was objected to at the time, so as to enable the court to correct or withdraw it from the jury. If exception is not taken, such charge may, nevertheless, be made ground in a motion for new trial, refusal of which, if it appears that the charge was flagrant error to the material injury of the defendant, will be cause for reversal. *Id.*

45. If, upon request of the jury, in explanation of his instructions, the judge gives an additional charge, confining it to the subject matter of the request, he commits no error. He cannot, however, go beyond the request. *Post* v. *State*, 598.

46. A charge was objectionable that instructed the jury "if you can reasonably account for or explain the facts and circumstances in evidence before you in this case in any way consistently with defendant's innocence, without resorting to unreasonable facts and theories, then you should do so and acquit. But if you cannot account for nor explain the facts and circumstances detailed before you in this case upon any reasonable ground consistently with defendant's innocence, then if you cannot do this you should convict." *Robertson* v. *State*, 602.

47. When the evidence in a murder trial has even the least tendency to bring the case under the provisions of arts. 570 and 572 of the Penal Code, it is incumbent on the court to give in charge to the jury the law governing such defenses, and they must be stated distinctly. See the opinion for a charge *held* error as blending the two articles. *Hill* v. *State*, 618.

48. Charge of the court is intrinsic error when it authorizes the jury arbitrarily to reject, or arbitrarily to receive and credit, the testimony of witnesses who testify before them. See this case for suggestion of this court with reference to charges to the jury upon the evidence. *Wilbanks* v. *State*, 642.

49. Purchase in good faith from one having possession, and without knowledge or reason to believe that the animals were stolen, is a valid defense, and, such purchase being an issue in the case, a charge is deficient that fails to enunciate the law applicable to such defense. *Ruston* v. *State*, 644.

50. In a trial for theft of a heifer alleged to belong to an unknown owner the evidence showed that the animal, though an estray and the owner unknown, was in the possession of the person on whose premises it ranged. *Held*, that the jury should have been instructed that the want of that person's consent to the taking of the animal by the defendant must be proved to the satisfaction of the jury, by circumstantial evidence or otherwise. *Spruill* v. *State*, 695.

51. See the opinion for a charge of the court held error, as being negative, and so general as to include every species of insanity. *Erwin* v. *State*, 700.

CHARGE OF THE COURT—continued.

52. However slightly the evidence may tend to establish the defense interposed, it is the duty of the court to charge the law applicable to such defense. *Id.*

53. A charge of the court is error that makes the test of insanity depend upon whether the defendant knew right from wrong generally, instead of with respect to the act of which he is charged in the indictment. *Id.*

54. When, as in the present case, the adultery is charged to have been committed by "habitual carnal intercourse," without cohabitation, it was error to so instruct the jury as to permit a conviction without proof that the carnal intercourse was "habitual." The phrase "habitual carnal intercourse," however, is a familiar and untechnical expression, and there is no need to explain it by instructions. *Collum* v. *State*, 708.

CIRCUMSTANTIAL EVIDENCE.

See CHARGE OF THE COURT, 15, 33, 39, 44.
EVIDENCE, 10.
MURDER, 9.

CONFESSIONS.

1. The rule which requires the exclusion of confessions made in arrest refers to confessions of the defendant, and not to statements made by a witness, unless it is made to appear that the witness was under arrest and charged with the offense on trial. *Reyes* v. *State*, 1.

2. In the trial of a defendant on an indictment which charges him as an accomplice, it is competent for the state to prove confessions of the principal offender, for the sole purpose of establishing the latter's guilt; but the jury should be instructed that the confession is not evidence against the defendant for any other purpose. *Simms* v. *State*, 131.

3. It is a general rule that statements made by the accused after his arrest, unless he is warned as provided by art. 750, Code of Crim. Proc., cannot be received in evidence against him. *Williams* v. *State*, 526.

4. It is now a settled principle of law that when the confession of a main fact is inadmissible, confession of collateral facts tending to establish the main fact are likewise inadmissible. *Id.*

5. No statement made by a party while in jail or legal custody is competent evidence against him, even as a mere link in a chain of evidence, unless it was voluntarily made before an examining court, or was voluntarily made after caution that it might be used against him, or unless, in connection therewith, he made state-

CONFESSIONS — continued.

ment of facts and circumstances found to be true, and which tend to establish his guilt. And it is immaterial that the offense for which he is in custody when he made the statement was a different offense than that on the trial for which it is offered in evidence. *O'Connell* v. *State*, 567.

6. Only such parts of the voluntary confession of an uncautioned prisoner as relate to verified disclosures are admissible against him. Other facts, though part of the same confession, are not. *Id.*

7. Confessions made under arrest, though not voluntary or after warning, may be used in evidence to the extent that the accused made statement of facts and circumstances found to be true, and no further. Only so much of the confession is admissible as was indicative of verified and inculpatory disclosures. *Massey* v. *State*, 645.

8. The other evidence showing that the stolen money was taken from a certain drawer, and the accused on producing the money having stated that he got it from that drawer, this declaration was admissible though made under arrest and without warning. *Id.*

CONTINUANCE.

See NEW TRIAL, 2, 9.

1. The day next before the trial of a theft case the defendant sued out a subpœna for two witnesses, and it was served on them the same day. When called for trial he moved for a continuance or a postponement on account of the non-attendance of one of them and the inebriety of the other. The trial court, after offering to attach the absent witness and holding the other to be sober enough to testify, overruled the motion, and the defendant was forced to proceed, and was convicted on evidence chiefly circumstantial. See the opinion *in extenso* for all the reasons on which it is *held* that the court below should have either sustained the motion or have granted a new trial. *McDow* v. *State*, 98.

2. An application for a continuance to secure witnesses to prove the purchase of an animal alleged to have been stolen should show where the alleged purchase was made with more particularity than on "the west side of the T. river," and with more certainty as to time than "in the spring or summer of 1880." *Williams* v. *State*, 114.

3. An application for continuance on account of absent witnesses is defective if it fails to show whether or not the subpœnas had been served, or whether diligence to secure service had been practiced; and is also defective if it does not show that they were issued by the proper authority. *Id.*

4. Since the Revised Statutes have gone into effect, the granting

CONTINUANCE — continued.

of even a first continuance is confided to the discretion of the trial court. *Id.*

5. Witnesses for whose evidence a continuance was asked resided in a county other than that in which the prosecution was pending. Process for them was secured by the defendant, and by him delivered to the sheriff of the forum, who promised to transmit the process to the sheriff of the county where the witnesses resided. Non-service was the basis of the application for continuance. *Held*, that diligence was not shown. *Hailes* v. *State*, 490.

6. Under our present Code the granting or refusal of an application for a continuance, whether the first or a subsequent one, based upon the absence of witnesses, is confided to the discretion of the trial court, and is no longer a matter of right. If, however, after trial and conviction, it appears that the evidence upon which the refused application was based was material, and probably true, a new trial should be granted. See this case for the distinctions between the old and new Codes on this subject. *Williams* v. *State*, 528.

7. Even a first application for a continuance, though conforming to the requirements of the statute, is now no longer a matter of right, but its truth and merits are addressed to the sound discretion of the trial court, and if overruled will be again considered by that court on the motion for new trial, in connection with the other evidence in the case. *Aiken* v. *State*, 610.

8. See the opinion for state of case wherein the defendant should have been awarded a postponement to procure the testimony of an absent witness, notwithstanding the desired testimony would have been cumulative. *Bostick* v. *State*, 705.

CONSTITUTIONAL LAW.

See JURORS AND JURY, 1.

COUNTERFEITING.

1. The offense of having in possession moulds and material used in counterfeiting current coin, with the intent to so use them, as defined by the Penal Code, article 464, is an offense separate and distinct from the offense of counterfeiting as defined by article 469 of the Code, and hence, an indictment for the first offense should not charge the constituent elements of the latter. *Long* v. *State*, 186.

2. A receipt found upon the person of the accused, and purporting to designate the ingredients of a compound suitable for counterfeiting purposes, was properly admitted in evidence; and the trial court did not err in permitting experts to testify that the composition thus formed would produce a material used in counterfeiting silver coin. *Id.*

D.

DELIRIUM TREMENS.
See INSANITY, 3, 4, 8.

DYING DECLARATIONS.
See MURDER, 23.

E.

ELECTION.
See ILLEGAL VOTING.
LOCAL OPTION LAW, 2, 3.
PRACTICE, 10.

EMBEZZLEMENT.

1. Embezzlement of "public moneys" is one of the crimes for which reciprocal extradition is stipulated by the extradition treaty of Mexico with the United States; but funds of a private incorporation are not "public moneys," and the treaty repudiates any right to extradite an embezzler of private property or money. *Blandford* v. *State*, 627.

2. Indictment or information for embezzlement must allege the value of the embezzled property. *Reside* v. *State*, 675.

3. The value is not sufficiently alleged by describing the embezzled property as "eight dollars in money consisting of one five-dollar bill, one two-dollar bill, and one one-dollar bill, circulating medium current as money." *Id.*

4. Appellant was charged with embezzlement as a "bailee" of certain funds "to be by him conveyed" to a designated place. *Quære:* Should not the prosecution have been for theft instead of embezzlement, conformably to article 788 of the Revised Penal Code, whereby embezzlement by a carrier is made theft? *Id.*

5. The indictment alleging the embezzlement of "one hundred and fifty-five dollars, then and there of the value of one hundred and fifty-five dollars, current money of the United States of America," it was incumbent on the State, in order to warrant a conviction for a felony, to prove that the embezzled property was, as alleged in the indictment, current money of the United States of America, and of value to the extent at least of twenty dollars. *Gerard* v. *State*, 690.

6. The value of property stolen or embezzled must be proved in order to disclose whether the offense be a felony or a misdemeanor. *Id.*

ESCAPE.
See OFFICIAL MISCONDUCT, 2.

If, after conviction, and pending the disposition of his appeal to this court, the accused effects his escape, this court is ousted of

ESCAPE — continued.

jurisdiction of such appeal, and jurisdiction can be re-invested only by the voluntary return and surrender of the accused within ten days. *Lunsford* v. *State*, 118.

EVIDENCE.

See ACCOMPLICE TESTIMONY.
BURDEN OF PROOF.
CONFESSIONS.
VARIANCE.

1. Evidence tending to show that the killing was done in the perpetration, or in the attempt at the perpetration of either arson, rape, robbery, or burglary, is admissible as part of the *res gestæ*, upon trial of an indictment charging murder by violence and upon express malice aforethought. *Reyes* v. *State*, 1.

2. The proper way to supply written testimony of a witness before a coroner's inquest, but since lost, is to introduce witnesses who were present when the witness' testimony was taken before the inquest, and have them testify as to what was deposed. See the opinion for circumstances under which the court properly excluded a copy of written testimony. *Id.*

3. The State was allowed, over objection, to prove that the deceased, while sitting in a church and after gazing out of a window, told a companion that the accused was outside and fixing to kill him (the deceased), and immediately stepped to the door, where he was fired upon and instantly killed. *Held*, that the declaration was *res gestæ*, and was properly admitted in evidence. *Means* v. *State*, 16.

4. In a trial for murder the defense asked a continuance in order to obtain proof that other persons besides the defendant had motives and opportunities to have killed the deceased. The inculpatory evidence not being purely circumstantial, it is *held* that the proposed proof was irrelevant and immaterial, and that the refusal of the continuance was not error. *Id.*

5. If the prosecution be in a county other than that in which the theft was committed, and the evidence shows that the value of the stolen property was enough to make the offense a felony, but that the value of the portion carried into the county of the former was not enough to make the offense a felony, the conviction can be for misdemeanor only. *Roth* v. *State*, 27.

6. If testimony be objectionable as hearsay or because it presupposes the existence of better evidence, its competency must be challenged in the trial court, and cannot be primarily assailed on appeal. *Id.*

7. A husband being prosecuted for an assault with intent to murder his wife, and the evidence of the wife tending to show that his anger was aroused by the presence with her of an unknown man

EVIDENCE — continued.

two days before the alleged assault, the defense offered to prove that some twenty days previous she had been surprised in an act of criminal intimacy with the unknown man, and that defendant was apprised of that fact. *Held*, that under the peculiar facts of this case, the exclusion of the proffered testimony was error. But it was not error to exclude proof of her general reputation for lewdness. *Greta* v. *State*, 86.

8. In a trial for assault with intent to murder, the defense proposed to introduce the county attorney for the purpose of proving that an indictment had been found against the prosecuting witness for assault to murder the defendant, and also proposed to introduce the indictment for the same purpose; to which the State objected, and the objections were sustained. *Held*, that the court did not err in this ruling. *McGuire* v. *State*, 125.

9. The state was allowed, over objection, to prove certain acts and declarations of said P., done and made subsequent to the homicide, and when the defendant was not present; and the defendant was found guilty of murder in the first degree "as principal." *Held*, that, as such acts and declarations of P. were not competent evidence under the count which charged the defendant as a principal offender, their admission may have been prejudicial to him, and therefore was material error. *Simms* v. *State*, 131.

10. In cases wholly dependent on circumstantial evidence no definite line of demarcation between proximate and remote facts can be drawn, and the criterion of their competency is merely whether they tend to cast any light, however feeble, upon the subject of the inquiry. See the facts and the opinion in this case in illustration of the latitude allowable in such cases. *Id.*

11. Whatever the former rule may have been, it is now settled that, to reproduce the testimony given at a former trial by a witness who has since died, the person called to prove it may state its substance, if unable to repeat its precise language. *Id.; Avery* v. *State*, 199.

12. As a standard of comparison to prove handwriting, the witness adopted a letter to himself purporting to be from one W., a penitentiary convict, the authorship of which letter was subsequently acknowledged by W. It was objected that the admission of W., he being a convict and thereby rendered infamous and incompetent as a witness, was incompetent to qualify the letter as a standard of comparison; which objection was overruled. *Held*, error; and that no fact stated by or derived from a convict, can, so long as the disability remains, be detailed as testimony by another, or used as evidence against a third party for any purpose. *Long* v. *State*, 186.

13. To the admission of the testimony of the officials of the

EVIDENCE — continued.

penitentiary to the effect that certain convicts in their custody, to whom the accused had access, were convicted for counterfeiting, the defense interposed the objection that the best evidence was the record of their conviction. *Held*, that, inasmuch as the officials had them in charge by legal process certifying their conviction, and they not being in possession of the record evidence, it was competent for them to state the offense of which the convicts had been convicted, as certified to them. And *held* further that this evidence was merely of a collateral fact involved in the investigation. *Id.*

14. No inflexible rule requires more than a *prima facie* showing of conspiracy between the defendant and a confederate, in order to make declarations of the latter evidence against the former. Nor is it absolutely requisite that the showing of the conspiracy shall precede the proof of the declarations, though that is the usual and preferable course of procedure. Such matters are largely subjected to the judicial discretion of the trial judge. *Avery* v. *State*, 199.

15. Every act and declaration of each conspirator, pending and pursuant to the concerted plan and subject, is the act and declaration of all and each of them, and it is therefore original evidence against any one of them, irrespective of the time at which he engaged in the conspiracy. Otherwise with regard to declarations made subsequent to the consummation of the conspiracy and not acquiesced in by the other confederates. *Id.*

16. In a trial for murder the State was allowed, over objection, to elicit from a witness what he was told by a confederate of the defendant, in the latter's absence and after the murder, about concealing the gun it was committed with. *Held*, not proper evidence to inculpate the defendant, but, being obviously of no significance in the present case, it was of no materiality. If the object of the proof had been merely to trace up and identify the gun, it would, it seems, have been legitimate. *Id.*

17. Physiology and obstetrics have established the position that the respiration of a child, after the parturition is complete, demonstrates that the circulation of its blood is independent of its mother, and shows its individual existence. But, as respiration may occur before the parturition is complete, it does not of itself suffice to prove the independent circulation and individual existence of the child. *Wallace* v. *State*, 255.

18. Note evidence which, in a trial for infanticide, is held insufficient to prove the existence of the child independent of its mother at the time the violence was inflicted upon it. *Id.*

19. Proof that the money of which the party injured was deprived was forty dollars and of the value of forty dollars, will not sustain a conviction under an indictment which described the

EVIDENCE — continued.

money as "forty dollars in current paper money of the United States, to wit: two ten dollar bills of the value of ten dollars each, and four five dollar bills of the value of five dollars each." *Mathews* v. *State*, 279.

20. Evidence that the property appropriated was of the value of fifteen dollars will not support a verdict finding the defendant guilty of swindling to an amount exceeding twenty-five dollars, and therefore of felony. *Id.*

21. In all cases where the verdict is for a minor degree of the offense charged in the indictment, the proof should meet the statutory definition of the minor degree. *Id.*

22. See evidence *held* insufficient to support a verdict for swindling, and *held* also not to warrant a charge of the court on that offense. *Id.*

23. Though the conclusion of guilt is presumed from the facts found, these facts must be strictly proved by the testimony of witnesses under whose observation they have actually and directly fallen, or the presumption of guilt must be made from facts which have been established by inference from the elementary facts of the case. The guilt of the accused should flow easily and naturally from the facts proved, and be consistent with all the facts. *Ward* v. *State*, 293.

24. If in a prosecution for assault and battery the intent imputed to the accused was to injure the mind or the feelings of the assaulted party, the evidence germane to the existence of the intent may well involve the character of the assaulted party, and the surrounding circumstances: — *e. g.*, if the battery consisted in manipulating a woman without her consent, and the intent imputed was to obtain sexual knowledge of her, proof of previous illicit intercourse between the parties, or evidence that she was a public prostitute, is legitimate for the defense as tending to disprove the imputed intent, and thus bearing directly on the issue. *Donaldson* v. *State*, 307.

25. In the case above indicated the defense was entitled to require the woman herself, though married, to answer whether there had been acts of sexual intercourse between her and the defendant prior to the alleged assault. *Id.*

26. The judgment of conviction and that alone is the legal and conclusive proof of the affiant's conviction, and his consequent infamy, and proof that the records of the court in which he was convicted were partially searched without finding the judgment, and that those records were voluminous, does not bring the defense within the rule which would allow it to resort to secondary evidence to show the affiant's infamy. *Perez* v. *State*, 327.

27. Motion in arrest of judgment for such a cause is insufficient unless accompanied by the judgment, or an authenticated copy

EVIDENCE — continued.

of the same, when no sufficient predicate for secondary evidence of the conviction had been laid. *Id.*

28. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it and thereby discredit his testimony. *Brite* v. *State*, 368.

29. The law does not sanction an unnecessary inquiry into the antecedents of a witness, for the purposes of impeachment. *Id.*

30. The ancient rule that a party cannot impeach his own witness is so far modified in this State as that a party may attack the testimony of the witness in any manner except by proving his bad character. See the opinion *in extenso* for an elaborate discussion of the question. *White* v. *State*, 381.

31. When a State's witness on a former trial has made statements contrary to those made on the trial pending, the State's counsel is authorized to interrogate the witness respecting such former different or contradictory statements. *Id.*

32. The corroboration of an accomplice required by law in order to warrant a conviction upon his testimony must tend pertinently to connect the accused with the offense. Corroboration as to matter having no tendency in this direction, however thorough and complete, will not suffice. *Weldon* v. *State*, 400.

33. In the trial of a man for adultery, the testimony of his paramour as a State's witness is that of an accomplice or *particeps criminis*, and will not support his conviction unless corroborated by other evidence tending to connect him with the offense. *Merritt* v. *State*, 402.

34. See evidence *held* insufficient in a trial for adultery to corroborate the testimony of the defendant's paramour. *Id.*

35. In order to sustain a prosecution for theft, when the taking was originally lawful, the proof must show that the taking was obtained by some false pretext, or with the intent to deprive the owner of the value of the property and to appropriate it to the use and benefit of the taker, and, furthermore, that the same was so appropriated. *Hornbeck* v. *State*, 408.

36. To justify a conviction there should be clearness and certainty in the proof,— such as would amount to that which is morally certain. *Smith* v. *State*, 420.

37. Failure to qualify as a witness with regard to the general reputation of another witness in the neighborhood for truth and veracity, the impeaching witness was properly held incompetent. *Trammell* v. *State*, 467.

38. But during his preliminary examination as to his means of knowledge, the witness stated that the reputation of another witness was bad. *Held*, that the court erred in refusing to withdraw

EVIDENCE — continued.

the statement from the jury, or to instruct the jury to disregard this statement of the proposed impeaching witness. *Id.*

39. Unless part of the *res gestæ*, or part of a conversation put in evidence by the prosecution, the declarations of one conspirator in favor of his fellow are not admissible as evidence. Note suggestions of this court as to what matter should be embraced in bills of exception reserved to the rulings of the court below on the evidence. *Wright* v. *State*, 476.

40. The question "from what you saw, did the defendant have as much to do with those horses as any body else?" was erroneously permitted, as leading and suggestive, and as calling for the opinion and conclusions of the witness. *Id.*

41. Proof that the accused was merely a clerk in the saloon will not sustain the allegation that he was a dealer. *Archer* v. *State*, 482.

42. Declarations made by a party accused of crime are not admissible as evidence in his behalf, unless they form a part of the *res gestæ*, or are a part of a confession offered by the prosecution, or come within the rule that when a part of an act or declaration has been given in evidence the whole may be required. *Pharr* v. *State*, 485.

43. Declarations of a party charged with murder, which were made the day after the killing, and many miles from the scene, form no part of the *res gestæ*. *Id.*

44. The contest in this case being whether or not the animal alleged to have been stolen corresponded with the description given in a bill of sale made by the defendant, and not over the description given in the bill of sale itself, upon which witnesses for both sides agreed, its production as primary evidence was not essential. The bill itself was neither the best nor any evidence upon the issue involved. *Hailes* v. *State*, 490.

45. Proof that the offense was committed within one hundred and twenty-five yards of a point located by the evidence within the body of the county is sufficient proof of the venue of the offense. *Willis* v. *State*, 493.

46. Art. 661 of the Code of Criminal Procedure provides that evidence essential to the due administration of justice shall be received at any time before the conclusion of argument. If the admission of the evidence was necessary to the due administration of justice, the court had no discretionary authority to exclude it. *Hewitt* v. *State*, 501.

47. It is a general rule that statements made by the accused after his arrest, unless he is warned as provided by art. 750, Code of Crim. Proc., cannot be received in evidence against him. *Williams* v. *State*, 526.

EVIDENCE — continued.

48. It is now a settled principle of law that when the confession of a main fact is inadmissible, confession of collateral facts tending to establish the main fact are likewise inadmissible *Id.*

49. In a prosecution for murder, a witness stated that he approached the deceased immediately after the fatal shot was given, and asked him "what is the matter with you?" to which he replied "Jack Williams shot me." It was also in proof that the defendant was commonly known by the nick-name "Jack Williams." After the witness had left the stand the defense moved the court to withdraw this evidence from the jury, upon the ground that it was not alleged that Jack and W. H. Williams, the defendant, were one and the same person. *Held*, that even if the objection had been interposed at the proper time, it would not have been tenable, as the answer to the question was so clearly interwoven with the transaction, being given after the deceased had sunk down in his death agony, and immediately preceding his death, that it was admissible as part of the *res gestæ;* and *held*, further, that the evidence showing that Jack and W. H. Williams were names commonly applied to the defendant, it was not necessary that the indictment should allege them to be one, to let in the proof, and therefore there is no variance between the *allegata* and *probata*. *Williams* v. *State*, 528.

50. See this case for evidence held insufficient to sustain a verdict of conviction for theft, wherefore a new trial should have been granted. *Ellis* v. *State*, 540.

51. If the testimony of a co-defendant be material and has become available by his acquittal, the want of it may constitute cause for a new trial. *Id.*

52. Indictment that charges the accused with permitting a game of cards to be played in a "public place under his control, to wit: a beer saloon," etc., is not supported by evidence that a game was played in a room over the saloon, but which fails to show any connection of the room with the saloon in its business or public capacity. *O'Brien* v. *State*, 544.

53. The room in which the game is played must be shown to have the inhibited character. It is not necessary that it be in the main business room, but it must be auxiliary to, or used in connection with the business of the principal room. *Id.*

54. Facts or circumstances relied upon to establish the principal fact at issue, or such as are necessary to the conclusion sought, must be proved, otherwise no sufficient foundation is laid for the process of inference or presumption which is to follow. Proof is indispensable at this stage of the trial, and its place cannot be supplied by presumption. See this case *in extenso* for an application of these rules. *Jernigan* v. *State*, 546.

EVIDENCE — continued.

55. When it appears that the defendant himself, upon the cross-examination of a State's witness, elicited objectionable or immaterial evidence, he cannot be heard to complain of evidence of similar import adduced by the prosecution. *Jones* v. *State*, 552.

56. In a criminal prosecution when guilty knowledge or criminal intention is of the essence of the offense, it is competent for the defendant to put his general character in evidence with respect to the offense charged against him. See the opinion *in extenso* on the question. *Id.*

57. Even though the question propounded to a witness does not directly call for his opinion, if it appears therefrom that whatever answer might be elicited could embody nothing but a mere expression of opinion, the question should be excluded. See the opinion for an example. *Campbell* v. *State*, 560.

58. The general rule is that it is for the witness to state the facts, and for the jury to draw the conclusions. Among the exceptions to this general rule which excludes the mere opinion of non-professional witnesses, one is that on a question of sanity or insanity, a non-professional witness may give his opinion, based upon facts which have come under his own observation. *Id.*

59. When a prisoner, having been examined as a witness in a prosecution against another person, has answered questions to which he might have demurred as tending to criminate himself, his answers are deemed voluntary, and as such may be subsequently used against him for all purposes. *O'Connell* v. *State*, 567.

60. Testimony taken on an examining trial before a magistrate is required by the Code to be reduced to writing, signed by the witness and certified by the officer. And where this is required the law presumes that the magistrate performed his duty; and if he did, parol evidence of what the witness said cannot be received. *Id.*

61. But if it be shown that the evidence was not reduced to writing, or if the written examination, by reason of irregularity, is wholly inadmissible, parol evidence of what was disclosed is admissible. If uncertain whether or not it was reduced to writing, the presumption that the officer discharged his whole duty obtains, and parol evidence will be rejected. *Id.*

62. To support a plea of insanity, the evidence must be such as to satisfy the minds and consciences of the jury to the extent that they can say he should be, and is, acquitted upon that ground. Should it fail to so satisfy them, their finding is conclusive and will in no case be reversed unless the finding is most clearly and directly against the evidence. (HURT, J., dissenting.) *Johnson* v. *State*, 571.

63. As a predicate for the introduction of the written testimony of one A. before an examining court, a witness stated

EVIDENCE — continued.

the contents of a letter received from A., showing his permanent removal beyond the jurisdiction of this State. The defendant complains that the letter itself was the proper evidence of its contents, but the judge's explanation to the bill of exceptions shows that the objection to the proof was not made when offered. *Held*, that, to be available, the objection should have been interposed when the proof was first offered. *Post* v. *State*, 579.

64. The residence beyond the jurisdiction of this State of a witness may be proved as other facts in the case, and no formal, independent oath to that effect is necessary in order to lay a predicate for the introduction of his written testimony. *Id.*

65. When a deposition is taken before an examining court or a jury of inquest, and is reduced to writing and certified according to law, the defendant being present and the privilege of cross-examination afforded him, and it is shown that since the deposition was taken the witness has died or removed beyond the limits of the State, or has been prevented from attending court by reason of age or bodily infirmity, or through the act or agency of the defendant, or by the act or agency of any person whose purpose it was to deprive the defendant of the benefit of the testimony, the deposition is admissible. *Id.*

66. That the defendant told the witness that he got certain property of the deceased was a fact clearly admissible in evidence, it being in proof that prior to the murder the defendant owned no property of the character described, and that immediately after the murder he was found in possession not only of that but of other property of the deceased. It is no objection that this evidence was elicited upon cross-examination of a witness for the defense. *Id.*

67. Conspiracy between the appellant and another to commit the offense of murder and robbery having been shown, not only the acts, declarations and conduct, but also the financial condition of his co-conspirator (in connection with his possession of effects of deceased) prior to the consummation of the conspiracy, were admissible in evidence against the appellant. *Post* v. *State*, 598.

68. The conspiracy having been shown, a bill of sale purporting to be a conveyance by the deceased to the co-conspirator of the appellant of certain effects of the deceased afterwards found in possession of the co-conspirator was properly admitted in behalf of the State. *Id.*

69. The declaration of the co-conspirator that he had hired the appellant to haul the property not having been made by the co-conspirator in the presence of the appellant while the latter was in the act of hauling the property was properly excluded from the jury, notwithstanding the State relied on the act of hauling as a fact inculpatory of the appellant. *Id.*

EVIDENCE — continued.

70. See the opinion in this for a *resumé* of evidence held insufficient to sustain a conviction for an assault with intent to commit robbery. *Robertson* v. *State*, 602.

71. The statement of a witness that a third party had admitted to him the commission of the offense for which the accused was on trial is inadmissible because hearsay, and hence a continuance should not be granted for its production. *Aiken* v. *State*, 610.

72. Evidence that the accused fled after the commission of the offense, together with the circumstances attending his flight, is legitimate proof for the consideration of the jury, in connection with the other inculpatory evidence. *Id.*

73. The other evidence showing that the stolen money was taken from a certain drawer, and the accused on producing the money having stated that he got it from that drawer, this declaration was admissible though made under arrest and without warning. *Massey* v. *State*, 645.

74. Declarations of the accused and of a third party as to the collection by the former of a sum of money some months before the theft, were properly excluded as evidence for the defense; those of the third party as hearsay, and as proof competent only to be made by him upon the stand. *Id.*

75. A distinct variance between the attestation clause of a deed alleged to be forged and the instrument as described *hæc verba* in the indictment, disqualifies it as evidence. *Rogers*, *Ex Parte*, 655.

76. When a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of description must be proved, inasmuch as all are made essential to the identity. *Simpson* v. *State*, 681.

77. In a trial for ordinary theft it is incumbent on the State to prove the value of the stolen property, notwithstanding it was currency such as the United States silver certificates. *Id.*

78. The indictment alleging the embezzlement of "one hundred and fifty-five dollars, then and there of the value of one hundred and fifty-five dollars, current money of the United States of America," it was incumbent on the State, in order to warrant a conviction for a felony, to prove that the embezzled property was, as alleged in the indictment, current money of the United States of America, and of value to the extent at least of twenty dollars. *Gerard* v. *State*, 690.

79. The value of property stolen or embezzled must be proved in order to disclose whether the offense be a felony or a misdemeanor. *Id.*

80. The statements of an accused when first found in possession of property recently stolen are admissible in his behalf, but his statements after he has parted with the property, and when he has not

EVIDENCE — continued.

the possession of it, are not. He cannot be permitted to fabricate evidence for himself by his own declarations. *Childress* v. *State*, 698.

81. There is no rule of law which requires that the question put to the impeaching witness shall be in the exact and precise language of that put to the witness sought to be impeached. If the predicate has been properly laid, it is sufficient if the question is germane and pertinent to the fact in regard to which the witness sought to be impeached had been questioned. *Bostick* v. *State*, 705.

EXTORTION.

Official extortion, as defined in article 240 of the Penal Code, is the wilful demand and reception by any officer authorized by law to receive fees of office, or by any person employed by such officer, of "higher fees than are allowed by law" for the services in question. If no fees were allowed by law for the services in question, then no prosecution under this provision can be maintained; and an indictment is bad which shows on its face that the services were not services for which any fees were allowed by law. See the opinion as to the requisites of an indictment for official extortion. *Smith* v. *State*, 413.

EXTRADITION.

1. Treaties between the United States and foreign nations are obligatory upon and cognizable by the tribunals of the several States as well as those of the Federal government. In the administration of the criminal law of this State, therefore, it is incumbent on the State courts to give effect to the provisions of the extradition treaty between the United States and Mexico when they are invoked by the accused and are applicable to his case. *Blandford* v. *State*, 627.

2. Embezzlement of "public moneys." is one of the crimes for which reciprocal extradition is stipulated by the extradition treaty of Mexico with the United States; but funds of a private incorporation are not "public moneys," and the treaty repudiates any right to extradite an embezzler of private property or money. *Id.*

3. Appellant was extradited to Texas from Mexico on a requisition charging him with theft (one of the offenses enumerated in the extradition treaty between the United States and Mexico), but prior to his extradition he was indicted in T. county, Texas, for embezzlement of private funds, which is an offense not enumerated in the treaty. Pleading to the jurisdiction of the court, he alleged that the offense for which he was placed on trial was not the offense for which he had been extradited nor one provided for in the said extradition treaty. *Held*, that the court below erred in sustaining a motion to strike out the plea, notwith-

EXTRADITION — continued.
standing it is a plea unknown to our Code of Criminal Procedure. See the opinion *in extenso* for an exposition of the doctrine of international extradition and of the extradition treaty between the United States and Mexico. *Id.*

F.

FACT CASES.

1. Evidence held sufficient to sustain convictions for murder in the first degree. *Reyes* v. *State*, 1; *Means* v. *State*, 16; *Avery* v. *State*, 199; *Williams* v. *State*, 528; *Post* v. *State*, 579; *Post* v. *State*, 598.

2. Note the facts of these cases with respect to the liability of bail. *Stafford* v. *State*, 46; *Peters* v. *State*, 302.

3. Evidence held insufficient to sustain convictions for theft. *Landin* v. *State*, 63; *Ward* v. *State*, 293; *Brite* v. *State*, 368; *Weldon* v. *State*, 400; *Hornbeck* v. *State*, 408; *Ellis* v. *State*, 540; *Simpson* v. *State*, 681; *Spruill* v. *State*, 695.

4. Evidence held sufficient to sustain convictions for murder in the second degree. *Bright* v. *State*, 68; *Aiken* v. *State*, 610.

5. Evidence held sufficient to sustain convictions for theft. *Hudson* v. *State*, 215; *Dodd* v. *State*, 370.

6. Evidence held insufficient in a trial for infanticide to prove that the child was born alive. *Wallace* v. *State*, 255.

7. Evidence held insufficient to support a conviction for swindling. *Mathews* v. *State*, 279.

8. Evidence held insufficient to sustain a conviction for assault. *Perez* v. *State*, 327.

9. Evidence held insufficient to sustain convictions for murder in the second degree. *White* v. *State*, 381; *Ross* v. *State*, 455.

10. Evidence held insufficient to corroborate accomplice witnesses. *Weldon* v. *State*, 400; *Merritt* v. *State*, 402; *Jernigan* v. *State*, 546.

11. Evidence held insufficient to sustain a conviction for unlawfully carrying weapons. *Smith* v. *State*, 420.

12. Note the facts of this case with reference to instructions to a jury in a murder case when the defense is grounded on insulting words or conduct towards a female relative. *Eanes* v. *State*, 421.

13. Evidence held insufficient to support a conviction for permitting a game of cards in a public place. *O'Brien* v. *State*, 544.

14. Evidence held sufficient on appeal to sustain a conviction over the defense of insanity. *Johnson* v. *State*, 571.

15. Evidence held insufficient to support a conviction for an assault with intent to commit robbery. *Robertson* v. *State*, 602.

16. Note a state of facts on which the defendant should have had

FACT CASES — continued.

a new trial because of deceit practiced on him by the main witness for the State. *Adams* v. *State*, 677.

17. Evidence held insufficient to support a conviction for embezzlement. *Gerard* v. *State*, 690.

FORGERY.

1. When it appears that a conspiracy to fabricate titles to lands in this State was entered into in Texas, and that one or more of the overt acts was perpetrated in Texas, the courts of this State have jurisdiction, independent of the act of 1876, to try the case, though it be shown that the actual fabrication was committed in another State by an agent or co-conspirator of the defendant. *Rogers*, *Ex Parte*, 655.

2. Independent of general principles, the statutes in force prior to the act of 1876 conferred such jurisdiction upon the courts of this State. See the opinion *in extenso* on the subject. *Id.*

FORMER ACQUITTAL.

A plea of former acquittal setting up facts which, if true, would constitute a bar to the prosecution, presents an issue for the determination of the jury under proper instructions, and the court erred in striking it out upon motion of the State. *Troy* v. *State*, 319.

FORMER JEOPARDY.

Former jeopardy obtains when it appears that the former trial was for an offense identified by the proof with the one on trial, and the usual test is whether the evidence necessary to support the pending prosecution would have supported the former one. See this case, wherein the plea is not well taken. *Rogers*, *Ex Parte*, 655.

G.

GAMING.

1. The appellant was prosecuted under an indictment charging that he did "unlawfully keep and exhibit a gaming table for the purpose of gaming." The evidence disclosed that the appellant was the proprietor of a saloon, and kept in his saloon a table upon which the game of dice was thrown for drinks and money, and upon which the game of dominoes was played. *Held*, that the tables denounced by arts. 358, 359, 360 of the Penal Code are such tables only as are constructed for the playing of certain specific inhibited games, in which the table is not only a part of the gaming device, but is also essential to the proper playing of the game. *Whitney* v. *State*, 377.

2. Prior to the act of March 5th, 1881, amendatory of arts. 364 and 365 of the Penal Code, and which took effect ninety days after its passage, the throwing of dice was not *per se* in violation of

GAMING — continued.

any law of this State. See the opinion for the substance of the amendment. *Id.*

3. Indictment that charges the accused with permitting a game of cards to be played in a "public place under his control, to wit: a beer saloon," etc., is not supported by evidence that a game was played in a room over the saloon, but which fails to show any connection of the room with the saloon in its business or public capacity. *O'Brien* v. *State*, 544.

4. The room in which the game is played must be shown to have the inhibited character. It is not necessary that it be in the main business room, but it must be auxiliary to, or used in connection with the business of the principal room. *Id.*

5. The charge should be confined to the kind of place named in the indictment. *Id.*

H.

HIDES AND ANIMALS.

Article 756, Penal Code, by which any butcher failing to report the animals he slaughtered is subject to fine, defines a substantive offense, not limited by or dependent on any other enactment, and is a general law in force throughout the State. There is no repugnancy between it and article 4565 of the Civil Statutes, which shows the kind of a report required of butchers under the penalty prescribed by said article 756. *Dreyer* v. *State*, 97.

HOMICIDE.

See MANSLAUGHTER.
MURDER.
SELF DEFENSE.

1. Homicide, as defined by the Penal Code of this State, "is the destruction of one human being by the act, agency, procurement, or culpable omission of another;" but it is further provided that the person upon whom the homicide is alleged to have been committed "must be in existence by actual birth." An infant cannot be the subject of homicide until its complete expulsion, alive, from the body of its mother. *Wallace* v. *State*, 255.

2. Negligent homicide is a killing which can only be predicated upon facts showing "no apparent intention to kill." *Aiken* v. *State*, 610.

I.

IDEM SONANS.

See VARIANCE, 1.

ILLEGAL VOTING.

1. Indictment for illegal voting need not allege the specific authority for the election at which the illegal vote was cast; nor the

ILLEGAL VOTING — continued.

authority of the officers; nor the names of the candidates. *Gallagher* v. *State*, 469.

2. That the election was "held and authorized by law within and for the city of W." sufficiently states the place of voting, and that the "vote was for city attorney and other officers then and there to be chosen at said election" sufficiently charges the purpose for which the election was held. *Id.*

3. Averment that the accused voted at an election authorized by law then and there holden, includes the further idea that it was held by the proper officers. *Id.*

4. That corporations are authorized by law to hold elections for city attorney and other officers, is a fact within the judicial knowledge of this court. *Id.*

5. Authorities conflict as to whether or not an indictment for illegal voting must aver the particular disability; but *held*, that the averment of the disability is the better and safer practice. *Id.*

6. The word "convicted" has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused. *Id.*

INDICTMENT.

See ALLEGATA ET PROBATA.
ASSAULT, 1.
INFORMATIONS.

1. Appellant was convicted of robbery on an indictment which alleged a sheep to be the property taken, but contained no allegation of the value of the animal. *Held*, that an allegation of the value was not necessary. *Williams* v. *State*, 8.

2. Indictment which merely charges that the parties "did then and there unlawfully cohabit together and carnally know each other," is insufficient to charge adultery. See the opinion for charging clause set out and *held* bad. *Edwards* v. *State*, 25.

3. When, as in this case, the defect in the indictment is matter of substance, the indictment is not amendable, and the prosecution will be dismissed. *Id.*

4. Theft of a bank-note is sufficiently charged if the indictment charges theft of a "bank-bill,"— the latter being the statutory term in this State. *Roth* v. *State*, 27.

5. Indictment charged theft of a note on the "Chatam National Bank;" but the note as proved and exhibited was on the Chat*h*am National Bank. *Held idem sonans*, and not a material variance between the alleged and the proved appellation of the bank. *Id.*

6. An indictment is not vitiated by bad spelling. *Hudson* v. *State*, 215.

7. Motion in arrest of judgment because the indictment did

INDICTMENT — continued.

not conclude "against the peace and dignity of the State" was founded upon the mis-spelling of the word "against",— the "i" and "n" being so transposed as to read "*aganist.*" *Held*, that the court did not err in overruling the motion. *Id.*

8. See the opinion for an indictment of two counts, *held* to charge offenses of a character so similar as not to be subject to the objection of duplicity. *Mathews* v. *State*, 279.

9. An indictment which purported to charge the appellant with carrying a pistol into a public assembly was quashed for that offense, but was sustained for the simple carrying of a pistol. *Held*, that, as the indictment contains all necessary allegations to charge the latter offense, there was no error to appellant's prejudice in the ruling of the trial court. *Pickett* v. *State*, 290.

10. Indictment for carrying a pistol need not allege that it was "unlawfully" carried. The phraseology of the statute suffices. *Id.*

11. Indictment or information for pursuing a taxable occupation without license should allege the amount of the taxes due and unpaid, and, if any part thereof be county tax, it should further allege the levy made by the county commissioners; and it is incumbent on the State to prove this allegation. *Crews* v. *State*, 292.

12. Article 113 of the Penal Code, whereby penalties are provided for persons who refuse to render their property for assessment, or to swear to the list rendered, etc., must be construed in connection with the provisions of the Civil Statutes which prescribe the duties in this regard of all owners and holders of taxable property. Therefore an indictment based on said article 113 should allege the year for which the defendant's taxable property was assessable. *Berry* v. *State*, 315.

13. The court and not the jury is to decide what are the words of an indictment or other pleading. If there is doubt which of two words is meant, the sensible rendering will be accepted. Bad handwriting, if legible, is not ground of legal objection. Erasures and interlineations will not necessarily render the pleading bad. *Dodd* v. *State*, 370.

14. Burden of proof is on the defendant to show by irresistible proof that the erasures and interlineations were not the act of the grand jury. *Id.*

15. Official extortion, as defined in article 240 of the Penal Code, is the wilful demand and reception by any officer authorized by law to receive fees of office, or by any person employed by such officer, of "higher fees than are allowed by law" for the services in question. If no fees were allowed by law for the services in question, then no prosecution under this provision can be maintained; and an indictment is bad which shows on its face that the services were not services for which any fees were allowed by law. See the opinion

INDICTMENT — continued.

as to the requisites of an indictment for official extortion. *Smith* v. *State*, 413.

16. Indictment for illegal voting need not allege the specific authority for the election at which the illegal vote was cast; nor the authority of the officers; nor the names of the candidates. *Gallagher* v. *State*, 469.

17. That the election was "held and authorized by law within and for the city of W." sufficiently states the place of voting, and that the "vote was for city attorney and other officers then and there to be chosen at said election" sufficiently charges the purpose for which the election was held. *Id.*

18. Averment that the accused voted at an election authorized by law then and there holden, includes the further idea that it was held by the proper officers. *Id.*

19. Authorities conflict as to whether or not an indictment for illegal voting must aver the particular disability; but *held*, that the averment of the disability is the better and safer practice. *Id.*

20. The word "convicted" has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused. *Id.*

21. Indictment, in order to charge an offense under art. 186 of the Penal Code, should allege that the accused was either a merchant, a grocer, or a dealer in wares and merchandise, or a trader in a lawful business, as the case may be. *Archer* v. *State*, 482.

22. If there be an exception in the enacting clause of a statute, such exception must be negatived, and though this be necessary, yet, if the subject-matter of the negative averment lies peculiarly within the knowledge of the accused, the averment is taken as true unless disproved by the accused. *Id.*

23. Prosecutions for selling liquor on Sunday do not, however, come within the exception. The allegation that the accused was "a dealer" does not occupy the position of a proviso or exception, but is an essential affirmative allegation, and must be proved. *Id.*

24. An offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either, and the indictment may allege the offense to have been committed in the county in which it is prosecuted. *Willis* v. *State*, 493.

25. Article 420 of the Code of Criminal Procedure directs that an indictment shall bear the signature of the foreman of the grand jury, but article 529 expressly provides that the want of such signature shall not constitute cause of exception to the form of an indictment. The validity of an indictment, therefore, is not affected by the failure of the foreman of the grand jury to sign it. *Jones* v. *State*, 552.

INDICTMENT — continued.

26. Exception to an indictment which goes to the form merely, and not to the substance, is not available by a motion in arrest of judgment. *Id.*

27. When an indictment for forgery purports to set out the forged instrument according to its tenor, and in *hæc verba*, any variance as to the words of the instrument, unless the variance be mere fault of spelling, is fatal to the indictment. *Rogers, Ex Parte*, 655.

28. Indictment or information for embezzlement must allege the value of the embezzled property. *Reside* v. *State*, 675.

29. The value is not sufficiently alleged by describing the embezzled property as "eight dollars in money consisting of one five-dollar bill, one two-dollar bill, and one one-dollar bill, circulating medium current as money." *Id.*

INFANTICIDE.

See MURDER, 10, 11.

INFORMATIONS.

See INDICTMENT.

1. Where, as in this case, there are expressions in the complaint not used in the information, but which, if treated as surplusage and stricken out, would leave the complaint complete, the variance is not fatal. *Meier* v. *State*, 39.

2. While an information or indictment for aggravated assault must charge the particular circumstance of aggravation relied upon, it need not charge the offense in so many words to be an "*aggravated assault.*" *Id.*

3. Information charges that appellant did "wilfully wound a hog, the same being the property of *him the said* H. S., contrary," etc. The name of H. S. nowhere else appears in the information. *Held*, that the words "him the said" may be eliminated as surplusage. *Rivers* v. *State*, 177.

4. Information that charges the wounding of "a hog" sufficiently describes the animal, as that term is included in the term "swine" as used in the statute. *Id.*

5. An information for the wilful wounding of an animal enumerated in the statute need not further allege that it is a "domesticated animal." *Id.*

6. An affidavit of a person who had been convicted of a felony, and who, unpardoned, had served a term in the penitentiary, is incompetent as the basis of a criminal prosecution. See the opinion *in extenso*. *Id.*

7. The better practice in cases where the information has been torn and so mutilated as to render illegible an entire line, would

INFORMATIONS — continued.

be to substitute the document under the provisions of art. 334, Code Crim. Proc. *Perez* v. *State*, 327.

8. An information in misdemeanor cases not based upon a complaint is insufficient to charge an offense, and upon motion or exception should be quashed. And such an exception would also be good on motion in arrest of judgment. *Id.*

9. Affidavit of a party who had been made infamous by reason of his previous conviction of a felony is not a legal or valid foundation for an information, and such exception, if sustained by proper evidence, would be available by a motion to quash or in arrest of judgment. *Id.*

INSANITY.

1. When in a trial for theft the defense is the insane propensity to steal known as kleptomania, and there is evidence tending to sustain that defense, the charge to the jury should distinctly present and specifically treat of the peculiar issue thus raised, and not stop with submitting the usual test of the defendant's ability in general to distinguish right from wrong. *Looney* v. *State*, 520.

2. To support a plea of insanity, the evidence must be such as to satisfy the minds and consciences of the jury to the extent that they can say he should be, and is, acquitted upon that ground. Should it fail to so satisfy them, their finding is conclusive and will in no case be reversed unless the finding is most clearly and directly against the evidence. (HURT, J., dissenting.) *Johnson* v. *State*, 571.

3. That delirium tremens is a species of insanity, and such as may render a party afflicted therewith incapable of the commission of crime, is no longer an open question. *Erwin* v. *State*, 700.

4. The accused having set up as his defense that at the time of the alleged offense he was laboring under an attack of delirium tremens, and there being evidence before the jury tending to establish this defense, it was the duty of the court to give in charge pointedly and directly, the principles of law applicable thereto. *Id.*

5. See the opinion for a charge of the court held error, as being negative, and so general as to include every species of insanity. *Id.*

6. However slightly the evidence may tend to establish the defense interposed, it is the duty of the court to charge the law applicable to such defense. *Id.*

7. A charge of the court is error that makes the test of insanity depend upon whether the defendant knew right from wrong generally, instead of with respect to the act of which he is charged in the indictment. *Id.*

8. Delirium tremens is usually the result of habitual use of intoxicants, but may also ensue from casual drunkenness. *Id.*

INTENT.

See ASSAULT, 3, 4.

EVIDENCE, 24, 35, 54.

It is expressly provided by the statutes of this State, that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act." *Aiken* v. *State*, 610.

J.

JOINDER OF OFFENSES.

The first count of an indictment for the murder of one S. charged the defendant as a principal offender, and the second charged that one P. was the princial offender and the defendant an accomplice. When the state closed its evidence in chief, the defense moved that the prosecution be required to elect between the counts. In view of the rule that a party indicted as a principal cannot be convicted as an accomplice, and *vice versa*, as well as on account of differences in the rules of evidence applicable to such diverse prosecutions, it is *held* that the motion should have been sustained. *Simms* v. *State*, 131.

JUDGMENT.

1. Final judgment cannot stand that does not specify with certainty the amount adjudged. *Ellis* v. *State*, 324.

2. In this case the record recites that a motion was made to correct the judgment *nisi*, yet it does not appear that the principal was in court, or that he had been served with notice of the motion; nor does it appear that the motion was made until after the entry of final judgment, nor that the correction of the jndgment was made in fact, though the motion seems to have been granted by the judge. Under such circumstances final judgment on a forfeiture of bail bond cannot stand. *Id.*

JURISDICTION.

1. If, after conviction, and pending the disposition of his appeal to this court, the accused effects his escape, this court is ousted of jurisdiction of such appeal, and jurisdiction can be re-invested only by the voluntary return and surrender of the accused within ten days. *Lunsford* v. *State*, 118.

2. The District, and not the County Court, is clothed by the Constitution with the jurisdiction to try offenses involving the misconduct of public officers; and neither the legislature nor the courts can impair that jurisdiction. *Hatch* v. *State*, 515.

3. Negligently permitting the escape of prisoners in the custody of the accused as an officer is an offense which comes within the definition of official misconduct, and as such, is triable in the District Court. *Id.*

JURISDICTION — continued.

4. *Watson* v. *State,* 9 Texas Ct. App. 212, overruled on the question of jurisdiction. *Id.*

5. Appellant was extradited to Texas from Mexico on a requisition charging him with theft (one of the offenses enumerated in the extradition treaty between the United States and Mexico), but prior to his extradition he was indicted in T. county, Texas, for embezzlement of private funds, which is an offense not enumerated in the treaty. Pleading to the jurisdiction of the court, he alleged that the offense for which he was placed on trial was not the offense for which he had been extradited nor one provided for in the said extradition treaty. *Held,* that the court below erred in sustaining a motion to strike out the plea, notwithstanding it is a plea unknown to our Code of Criminal Procedure. See the opinion *in extenso* for an exposition of the doctrine of international extradition and of the extradition treaty between the United States and Mexico. *Blandford* v. *State,* 627.

6. When it appears that a conspiracy to fabricate titles to lands in this State was entered into in Texas, and that one or more of the overt acts was perpetrated in Texas, the courts of this State have jurisdiction, independent of the act of 1876, to try the case, though it be shown that the actual fabrication was committed in another State by an agent or co-conspirator of the defendant. *Rogers, Ex Parte,* 655.

7. Independent of general principles, the statutes in force prior to the act of 1876 conferred such jurisdiction upon the courts of this State. See the opinion *in extenso* on the subject. *Id.*

JURORS AND JURY.

1. Only such persons as under our Constitution and laws are qualified voters in the State and county are competent to serve on juries in this State. *Armendares* v. *State,* 44.

2. Several jurors having answered on *voir dire* that they were citizens of this State, they were accepted and impaneled. After trial and conviction it was discovered that they were in fact citizens of Mexico, whereupon the accused moved for a new trial, and set up their non-qualification as cause. *Held,* that the court erred in refusing to grant a new trial. *Id.*

3. Proposed jurors having qualified themselves on *voir dire,* the accused is not required to presume them guilty of perjury, and extend his investigation. See the opinion for state of facts which will avoid the stringent application of the rule laid down in *Roseborough* v. *The State,* 43 Texas, 570; *O'Meally* v. *The State,* 1 Texas Ct. App. 180, and *Lester* v. *The State,* 2 Texas Ct. App. 423. *Id.*

4. The defense complained that the sheriff was present in the jury room during the deliberations of the jury, and when a juror

JURORS AND JURY—continued.

proposed to return to the court and report disagreement, he advised against such proceeding and said that the court would not yet discharge the jury. The trial court explains the bill of exceptions to the effect that the sheriff heard nothing said in the jury room except the proposition to report a disagreement, and only said that the court would not discharge the jury after so short a deliberation. *Held*, that no prejudice to appellant is apparent; but note the suggestions of this court concerning the presence of sheriffs during the deliberation of juries. *McGuire* v. *State*, 125.

5. The record on appeal must show that the jury were sworn. *Berry* v. *State*, 815.

6. The record must show that the jury was a legal one, though a general recital to that effect suffices, without naming any juror. *Marks* v. *State*, 384.

7. Juries in the County Courts consist of but six men, and they must unanimously concur in the verdict. *Id.*

8. The entry in a misdemeanor case recited a verdict found by "a jury of good and lawful men, to wit, P. H. Ebner," and that name was signed to the verdict as foreman. *Held*, that no presumptions can be indulged in aid of the entry or verdict, which import a jury composed of but one man. *Id.*

9. *Quære*, whether the provision of the Revised Code of Procedure that the verdict in a felony case must be signed by the foreman is only directory? But that is the better practice in felony cases. *Id.*

10. A proffered juror, stating on his *voir dire* that he had formed an opinion, and that evidence would be required to remove it, was further tested by the court, and stated that he had never heard witnesses, nor any one who pretended to know the facts, detail them; that the opinion formed was not definite and fixed; that he had no present conviction, and could render a verdict entirely free from any previous opinion. *Held*, that, the examination of the proposed juror stopping here, the trial court did not err in holding him a competent juror. *Post* v. *State*, 579.

11. The law regulating the organization of juries in criminal trials does not confide to the trial judge a discretionary power to excuse a juror summoned on a special *venire*, and such action on the part of the court is error notwithstanding the defendant did not interpose instant objection, and notwithstanding that he did not exhaust his peremptory challenges. See the opinion *in extenso* on the question. *Hill* v. *State*, 618.

12. Though the court erred in refusing to permit the accused to further test a juror after the latter had, by his own answers, raised a doubt of his qualification, it was not such error as requires a reversal of the judgment when it appears that the accused relieved himself of the obnoxious juror by peremptory challenge, and suffered no prejudice. *Massey* v. *State*, 645.

K.

KLEPTOMANIA.
See INSANITY, 1.

L.

LIMITATION.

It is incumbent on the State to prove an offense not barred by limitation, but, when nothing in the evidence raises a doubt whether the prosecution was barred, there is no occasion for instructions to the jury on the subject. *Vincent* v. *State*, 330.

LOCAL OPTION LAW.

1. A regular practicing physician and druggist in a locality in which the local option law is in force, prescribing for a patient a compound of which whiskey is a necessary ingredient, is authorized to sell the whiskey without requiring the prescription of another physician. *Boone* v. *State*, 418.

2. The action of the Commissioners' Court in ordering an election under the local option law, the election and all of its incidents, must conform strictly to the requirements of the statute, or the election will be void. *Id.*

3. The law requires that at its first regular session after the petition is filed, the Commissioners' Court shall order an election to be held at all of the regular voting places within the proposed limits, upon a day not exceeding thirty and not less than fifteen days from the date of the order. *Held*, that when it appears that the election was ordered and held thirty-one days after the date of the order, the election is void. *Id.*

M.

MALICE.
See MURDER, 26.

MALICIOUS MISCHIEF.

1. An indictment which charges the wounding of the animal to have been either wilful or wanton sufficiently charges an offense under article 680 of the Revised Penal Code. But such indictment would not have been good under the old law. Under that law the wounding must have been charged as both wilful and wanton. *Rountree* v. *State*, 110.

2. The indictment charged the wilful wounding of a cow on November 1, 1879, but the proof showed that the offense, if committed at all, was committed on the last day of June or first of July, and before the Revised Statutes took effect. The defendant assailed the indictment as insufficient with reference to the old law, by motion in arrest of judgment. *Held*, that, as the indictment was

MALICIOUS MISCHIEF — continued.

sufficient to charge the offense under the present law, the court did not err in overruling the motion in arrest. *Id.*

3. Information charges that appellant did "wilfully wound a hog, the same being the property of *him the said* H. S., contrary," etc. The name of H. S. nowhere else appears in the information. *Held*, that the words "him the said" may be eliminated as surplusage. *Rivers* v. *State*, 177.

4. Information that charges the wounding of "a hog" sufficiently describes the animal, as that term is included in the term "swine" as used in the statute. *Id.*

5. An information for the wilful wounding of an animal enumerated in the statute need not further allege that it is a "domesticated animal." *Id.*

6. The accused was indicted under art. 679 of the Penal Code for the wilful killing of a cow. In the charge the court embraced all of the animals and birds named in the Code. While this court does not hold such error sufficient for reversal, the propriety of confining the charge to the animal named in the indictment is suggested. *Haynes* v. *State*, 480.

MANSLAUGHTER.

See MURDER.

SELF DEFENSE.

1. If in a murder case there be evidence which, however inconclusively, tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury; and it should be given affirmatively, directly, and pertinently to the theory of the case indicated by such evidence. Mere negative or abstract propositions are not sufficient. *McLaughlin* v. *State*, 340.

2. The Penal Code (article 597, § 4) makes insulting words or conduct towards a female relative of the slayer an adequate cause for the passion which reduces voluntary homicide to manslaughter, provided (art. 598) the killing occurred immediately upon the happening thereof, or so soon thereafter as the slayer, having been informed of the insults, met with the person killed. These provisions render inapplicable to such a case the requirements of article 594 that the provocation must arise at the time of the killing and the passion be not the result of a past provocation. The time intervening between the slayer's apprisal of the insult and his first meeting with the deceased is not a material consideration; but it is essential not only that the adequate cause have a status in the evidence, but that the state of the slayer's mind predicated thereon did actually exist at the time he killed the deceased. *Eanes* v. *State*, 421.

MANSLAUGHTER — continued.

3. In the state of case contemplated in said articles 597 and 598 four issues of fact are presented: 1, the occurrence of insulting words or conduct on the part of the deceased towards a female relative of the accused; 2, whether that was the real provocation which induced the killing; 3, whether the killing took place immediately on the happening of the insult, or as soon thereafter as the accused, having been apprised thereof, met with the deceased; and 4, whether the accused, when he killed the deceased, was affected by such a degree of anger, rage, resentment, or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection. But in determining these issues the jury should be instructed to consider the aspect in which the evidentiary circumstances presented themselves to the accused at the time he acted upon them. *Id.*

4. With reference to the issues above indicated, the jury should be instructed upon the legal import of the statutory phraseology descriptive of the particular passion involved in the issues. For instance, if anger be the passion imputable to the provocation, its characteristics should be so explained that the jury can distinguish it from rage, resentment, or terror. See the opinion *in extenso* on this subject. *Id.*

5. The evidence on such issues may also, as in the present case, necessitate an exposition of the legal import of "cooling time;" *i. e.*, interim sufficient for the mind of the accused to have become calm enough to enable him to act coolly and understandingly in view of the probable consequences. *Id.*

6. If, as in the present case, the slayer did not act on his own knowledge, but on information given him by others, the question with regard to the "cooling time" is not whether, after he received the information and before he acted upon it, a sufficient time elapsed for his mind to cool, but whether his anger still prevailed when he first met with and killed the deceased. *Id.*

7. An attempted unlawful arrest is deemed in law a provocation sufficient to reduce a killing in resisting it from murder to manslaughter. *Ross* v. *State*, 455.

8. See the opinion *in extenso* for a charge upon manslaughter requested by the defendant, but properly refused because the charge was not warranted by the evidence. *Williams* v. *State*, 528.

9. A defendant on trial for an offense which admits of degrees, cannot be heard to complain that he was convicted of a lower grade of offense than the evidence would have warranted. *Campbell* v. *State*, 560.

MURDER.
See MANSLAUGHTER.
SELF DEFENSE.

MURDER — continued.

1. Evidence tending to show that the killing was done in the perpetration, or in the attempt at the perpetration of either arson, rape, robbery, or burglary, is admissible as part of the *res gestæ*, upon trial of an indictment charging murder by violence and upon express malice aforethought. *Reyes* v. *State*, 1.

2. The rule which requires the exclusion of confessions made in arrest refers to confessions of the defendant, and not to statements made by a witness, unless it is made to appear that the witness was under arrest and charged with the offense on trial. *Id.*

3. See evidence held sufficient to sustain a conviction for murder in the second degree. *Id.*

4. The State was allowed, over objection, to prove that the deceased, while sitting in a church and after gazing out of a window, told a companion that the accused was outside and fixing to kill him (the deceased), and immediately stepped to the door, where he was fired upon and instantly killed. *Held*, that the declaration was *res gestæ*, and was properly admitted in evidence. *Means* v. *State*, 16.

5. In a trial for murder the defense asked a continuance in order to obtain proof that other persons besides the defendant had motives and opportunities to have killed the deceased. The inculpatory evidence not being purely circumstantial, it is *held* that the proposed proof was irrelevant and immaterial. *Id.*

6. In a murder case the defense was an *alibi*, and the defendant's proof was to the effect that, at the time of the homicide, he was with his brother at a ranche several hundred yards distant. Besides charging the reasonable doubt on the entire case and on the general question of the defendant's presence at the place and time of the homicide, the charge applied it specifically to the defendant's proof. *Held*, that this did not restrict the scope of the defense of *alibi*. *Id.*

7. The state was allowed, over objection, to prove certain acts and declarations of said P., done and made subsequent to the homicide, and when the defendant was not present; and the defendant was found guilty of murder in the first degree "as principal." *Held*, that, as such acts and declarations of P. were not competent evidence under the count which charged the defendant as a principal offender, their admission may have been prejudicial to him, and therefore was material error. *Simms* v. *State*, 131.

8. In a trial for murder the State was allowed, over objection, to elicit from a witness what he was told by a confederate of the defendant, in the latter's absence and after the murder, about concealing the gun it was committed with. *Held*, not proper evidence to inculpate the defendant, but, being obviously of no significance in the present case, it was of no materiality. If the object of the proof had been merely to trace up and identify the gun, it would, it seems, have been legitimate. *Avery* v. *State*, 199.

MURDER — continued.

9. In a trial for murder the inculpatory evidence was circumstantial, except the testimony of a State's witness against whom there was some proof of complicity, and the contested issue was the identification of the defendant as the assassin. He proposed to prove that the State's witness was at enmity with the deceased, had threatened his life, and carried weapons for him; but, on objection, the proof was excluded. *Held*, that the proposed proof was competent in this state of case, and its exclusion was error. Otherwise, however, had it not proximately tended to exculpate the defendant, and thus distinguished the case from *Boothe* v. *State*, 4 Texas Ct. App. 202, and others in which the proof only tended to show malice of the third party against the deceased. See the opinion *in extenso* on the question. *Dubose* v. *State*, 230.

10. An averment in an indictment for infanticide that the deceased infant was a female is of that class of averments known as descriptive, and it was incumbent on the State to prove it. *Wallace* v. *State*, 255.

11. Homicide, as defined by the Penal Code of this State, "is the destruction of one human being by the act, agency, procurement, or culpable omission of another;" but it is further provided that the person upon whom the homicide is alleged to have been committed "must be in existence by actual birth." An infant cannot be the subject of homicide until its complete expulsion, alive, from the body of its mother. *Id.*

12. Physiology and obstetrics have established the position that the respiration of a child, after the parturition is complete, demonstrates that the circulation of its blood is independent of its mother, and shows its individual existence. But, as respiration may occur before the parturition is complete, it does not of itself suffice to prove the independent circulation and individual existence of the child. See the opinion *in extenso* on this subject. *Id.*

13. Note evidence which, in a trial for infanticide, is held insufficient to prove the existence of the child independent of its mother at the time the violence was inflicted upon it. *Id.*

14. At the defendant's first trial for murder he was convicted in the second degree, and, having obtained a new trial, he objected thereat to all evidence tending to prove that the killing was upon express malice. *Held*, that the objection was properly overruled. *McLaughlin* v. *State*, 340.

15. A conviction for murder in the second degree will not be set aside because the proof tended to show that the killing was upon express malice aforethought. *Elliston* v. *State*, 361.

16. See evidence held insufficient to support a conviction of murder in the second degree. *White* v. *State*, 381.

17. In the state of case contemplated in articles 597 and 598 four issues of fact are presented: 1, the occurrence of insulting

MURDER — continued.

words or conduct on the part of the deceased towards a female relative of the accused; 2, whether that was the real provocation which induced the killing; 3, whether the killing took place immediately on the happening of the insult, or as soon thereafter as the accused, having been apprised thereof, met with the deceased; and 4, whether the accused, when he killed the deceased, was affected by such a degree of anger, rage, resentment, or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection. But in determining these issues the jury should be instructed to consider the aspect in which the evidentiary circumstances presented themselves to the accused at the time he acted upon them. *Eanes* v. *State*, 421.

18. The evidence on such issues may also, as in the present case, necessitate an exposition of the legal import of "cooling time;" *i. e.*, interim sufficient for the mind of the accused to have become calm enough to enable him to act coolly and understandingly in view of the probable consequences. *Id.*

19. If a trespasser, unarmed, attempts a trespass upon the property of another, and neither intends nor attempts to commit a felony or inflict serious bodily harm, if the owner in resisting kills the trespasser unnecessarily and with a deadly weapon, he is guilty of murder. *Ross* v. *State*, 455.

20. But if the trespasser is armed and attempts to take the property by force, and manifestly intends to take the life of the owner if necessary to acquire possession of the property, his killing by the owner will be held to be excusable self-defense. *Id.*

21. Declarations of a party charged with murder, which were made the day after the killing, and many miles from the scene, form no part of the *res gestæ*. *Pharr* v. *State*, 485.

30. The italicising or underscoring of the word "unlawfully" in a charge of the court on a case of murder affords the accused no ground of complaint. The killing to be criminal must be unlawful, and this cannot be too pointedly called to the attention of the jury. *Id.*

23. In a prosecution for murder, a witness stated that he approached the deceased immediately after the fatal shot was given, and asked him "what is the matter with you?" to which he replied "Jack Williams shot me." It was also in proof that the defendant was commonly known by the nick-name "Jack Williams." After the witness had left the stand the defense moved the court to withdraw this evidence from the jury, upon the ground that it was not alleged that Jack and W. H. Williams, the defendant, were one and the same person. *Held*, that even if the objection had been interposed at the proper time, it would not have been tenable, as the answer to the question was so clearly interwoven

MURDER — continued.

with the transaction, being given after the deceased had sunk down in his death agony, and immediately preceding his death, that it was admissible as part of the *res gestæ;* and *held*, further, that the evidence showing that Jack and W. H. Williams were names commonly applied to the defendant, it was not necessary that the indictment should allege them to be one, to let in the proof, and therefore there is no variance between the *allegata* and *probata. Williams* v. *State*, 528.

24. That the defendant told the witness that he got certain property of the deceased was a fact clearly admissible in evidence, it being in proof that prior to the murder the defendant owned no property of the character described; and that immediately after the murder he was found in possession not only of that but of other property of the deceased. It is no objection that this evidence was elicited upon cross-examination of a witness for the defense. *Post* v. *State*, 579.

25. Conspiracy between the appellant and another to commit the offense of murder and robbery having been shown, not only the acts, declarations and conduct, but also the financial condition of his co-conspirator (in connection with his possession of effects of deceased) prior to the consummation of the conspiracy, were admissible in evidence against the appellant. *Post* v. *State*, 598.

26. Though malice is the essential ingredient of murder, the principle is elementary that this specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life as shows a man to be an enemy to all mankind; as when a man resolves to kill the next man he meets and does kill him; or shoots into a crowd wantonly, not knowing whom he may kill. *Aiken* v. *State*, 610.

27. When the evidence in a murder trial has even the least tendency to bring the case under the provisions of arts. 570 and 572 of the Penal Code, it is incumbent on the court to give in charge to the jury the law governing such defenses, and they must be stated distinctly. See the opinion for a charge *held* error as blending the two articles. *Hill* v. *State*, 618.

N.

NEGLIGENT HOMICIDE.

See HOMICIDE, 2.

See the opinion and the facts for a state of proof which in a trial for murder makes the law of negligent homicide a part of the law applicable to the case. *Elliston* v. *State*, 361.

NEW TRIAL.

See CONTINUANCE.

1. Several jurors having answered on *voir dire* that they were

NEW TRIAL — continued.

citizens of this State, they were accepted and impaneled. After trial and conviction it was discovered that they were in fact citizens of Mexico, whereupon the accused moved for a new trial, and set up their non-qualification as cause. *Held*, that the court erred in refusing to grant a new trial. *Armendares* v. *State*, 44.

2. Unless it appears upon the trial that the desired evidence was of a material character, and that the facts set forth in the application were probably true, a new trial should not be granted on account of the refusal of a continuance. See the opinion for rulings of the court below, *held* correct under these rules. *Williams* v. *State*, 114.

3. By the Code of Procedure, article 777, all motions for new trials in criminal cases are subjected to the regulations which govern such motions in civil suits. Those regulations are well established and defined, and permit a new trial on account of newly-discovered evidence only when necessary to the ends of justice, and require diligence on the part of the applicant, and that the evidence be material and not merely cumulative. No indulgence is accorded to the negligent, and applications founded on slight circumstances will be promptly overruled. See the opinion *in extenso* on this subject. *White* v. *State*, 167.

4. The Code of Procedure, article 779, enacts that a new trial must be applied for within two days after the conviction, but provides that "for good cause shown" in a case of felony the trial court may allow the application to be made at any time before the close of the term. This in effect confides to the judicial discretion of the trial court the determination of applications made after the expiration of two days; and therefore the exercise of that discretion will not be revised on appeal unless it has been abused to the appellant's prejudice. *Id.*

5. Nearly a month after the appellant was convicted of burglary, he presented to the court below an application for a new trial based on newly-discovered evidence contradictory of the injured party's denial that appellant was his domestic servant. The trial court refused to allow the application to be filed, but the record shows that its merits were considered and passed upon, and nothing indicates an abuse of its discretion by the trial court. *Held*, that no error in the action of the court below is made apparent. *Id.*

6. By the Revised Code of Procedure, article 781, the State is now enabled to take issue on the causes assigned for a new trial by the defense, and in determining the issue the trial judge is required to hear evidence "by affidavit or otherwise;" and this authorizes him to receive oral proof. *Childs* v. *State*, 183.

7. Want of diligence in the discovery of evidence by the defendant is not excused on account of his confinement in jail, unless it be

NEW TRIAL — continued.

further shown that he had no one outside to render him the necessary assistance. *Id.*

8. By the Code of Procedure, article 777, new trials in felony cases are positively interdicted for any cause other than those specified in the same article. Surprise occasioned by the testimony of a witness is not among the causes specified, and therefore is not cause for a new trial. *Id.*

9. Surprise resulting from unexpected testimony may, notwithstanding the trial is in progress, be cause for the continuance of the case or a postponement of the trial, provided the motion therefor is opportunely interposed. *Id.*

10. A juror on his *voir dire* disclaimed bias or prejudice, or any conclusion as to the guilt or innocence of the accused; but it is shown by the affidavits of two jurors that, before the jury was fully impaneled, he said to them that "he was a poor juror for the defendant;" and by the affidavits of the accused and his counsel that these facts were unknown to them until after the trial, and further that the defense had not exhausted its challenges when the jury was completed. The counter-affidavit of the impugned juror sets up that he was not biased or prejudiced against the defendant, and had not, when he qualified himself, formed any conclusion as to his guilt or innocence, but does not deny or explain the remarks imputed to him. *Held*, sufficient ground for new trial. *Long* v. *State*, 186.

11. See the opinion *in extenso*, and general summary for condition of evidence that would warrant the granting of a new trial in order to give the defendant the benefit of the testimony of a co-defendant acquitted subsequently to defendant's conviction. *Howell* v. *State*, 298.

12. See the opinion for a summary of evidence so meager as to demand the granting of a new trial in a case of hog-theft. *Brite* v. *State*, 368.

13. Absence of counsel is no cause for new trial. See the opinion for peculiarity of a motion based on this ground. *Williams* v. *State*, 528.

14. If the testimony of a co-defendant be material and has become available by his acquittal, the want of it may constitute cause for a new trial. *Ellis* v. *State*, 540.

15. In a trial for theft the only evidence which tended to incriminate the defendant was the testimony of a State's witness who, prior to the trial, assured the defendant and his counsel that he knew nothing whatever about the case and nothing inculpatory of the defendant. In view of the deceit thus practised on the defendant and the unreliable character of the evidence against him, this

NEW TRIAL — continued.

court sets aside the conviction and awards a new trial. *Adams* v. *State*, 677.

16. The motion for a new trial was supported by an affidavit setting out that, immediately after the verdict was rendered against the defendant, the affiant saw the prosecuting witness take another witness who had testified for the State, aside, and secretly give her five dollars in money. This affidavit was not controverted either by the prosecuting witness or by the witness charged to have been bribed. *Held*, that the new trial asked should have been awarded. *Bostick* v. *State*, 705.

O.

OCCUPATION TAX.

1. Recognizance which recited the offense to be "unlawfully pursuing the occupation of selling medicated bitters in quantities of a quart and less than five gallons, without obtaining a license therefor," sufficiently describes an offense under the Revised Penal Code. Otherwise under the law anterior to the revision of the Codes. *Viser & Carson* v. *State*, 86.

2. Information charged the offense of pursuing the occupation of selling medicated bitters, etc.; but the trial court instructed the jury that the prosecution was for "selling medicated bitters." etc. *Held*, that the instruction misdirected the jury as to the accusation against the defendants, and was therefore essentially erroneous. *Id.*

3. Indictment or information for pursuing a taxable occupation without license should allege the amount of the taxes due and unpaid, and, if any part thereof be county tax, it should further allege the levy made by the county commissioners; and it is incumbent on the State to prove this allegation. *Crews* v. *State*, 292.

OFFICERS.

See EXTORTION.

OFFICIAL MISCONDUCT.

1. The District, and not the County Court, is clothed by the constitution with the jurisdiction to try offenses involving the misconduct of public officers; and neither the legislature nor the courts can impair that jurisdiction. *Hatch* v. *State*, 515.

2. Negligently permitting the escape of prisoners in the custody of the accused as an officer is an offense which comes within the definition of official misconduct, and as such is triable in the District Court. *Id.*

3. *Watson* v. *State*, 9 Texas Ct. App., 212, overruled on the question of jurisdiction. *Id.*

P.

PARDON.

It is only in cases of conviction for perjury or false swearing that a charter of pardon must specifically restore the competency of the convict to testify in courts of justice. In all other cases of felonious convictions, a general pardon effectuates the restoration of competency to the convict, and makes his affidavit a sufficient basis for a criminal prosecution. See the opinion for a charter of pardon *held* to be a general pardon. *Rivers* v. *State*, 177.

PENALTY.

1. If, upon the conviction of the same defendant at the same term of court for more than one offense, the punishment assessed in each conviction be confinement in the penitentiary, judgment and sentence shall be rendered and pronounced in each case as though there had been but that one conviction, but the judgment in the second or a subsequent conviction shall be that the punishment shall begin only when that adjudged in the preceding case has ceased to operate. The rule laid down in *Prince* v. *The State*, 44 Texas, 480, has been superseded by the Revised Code of Criminal Procedure, art. 800. *Shumaker* v. *State*, 117.

2. Upon a conviction for bigamy wherein the punishment assessed was one hour's confinement in the penitentiary, sentence was pronounced against the accused. After one hour had expired, the accused, never having been incarcerated in the penitentiary, applied for his discharge under a writ of *habeas corpus*, claiming that he was entitled thereto by virtue of art. 825, Code Crim. Proc., which provides that the term of imprisonment in a conviction for a felony shall commence from the time of sentence. *Held*, that notwithstanding the provision of the article referred to, the term of imprisonment of the accused could not commence until he is actually delivered to the penitentiary authorities, and placed in confinement inside of the penitentiary walls. *Sartain* v. *State*, 651.

PLEA.

1. Plea of guilty to an indictment for felony must be made in open court and by the defendant in person. It may be made orally, but must be entered of record. *Saunders* v. *State*, 336.

2. To the validity or acceptance of such a plea in a felony case the Code of Procedure prescribes three indispensable preliminaries, viz., 1, that the defendant be admonished by the trial court of the consequences of the plea; 2, that it plainly appears that he is sane; and 3, that he plainly appears uninfluenced by any consideration of fear, or by persuasion, or delusive hope of pardon. These prerequisites must be made manifest of record, and cannot

PLEA — continued.

be supplied by inference, intendment, or presumption. *Id.; Wallace* v. *State*, 407.

3. The Code of this State allows no such plea to an indictment as a plea in abatement. See the opinion *in extenso* for a discussion of pleas to indictments. *Dodd* v. *State*, 370.

4. Former jeopardy obtains when it appears that the former trial was for an offense identified by the proof with the one on trial, and the usual test is, whether the evidence necessary to support the pending prosecution would have supported the former one. See this case, wherein the plea is not well taken. *Rogers, Ex Parte*, 655.

PRACTICE.

See AFFIDAVIT.
AMENDMENT.
APPEAL.
BAIL BOND.
BILLS OF EXCEPTION.
CHARGE OF THE COURT.
CONTINUANCE.
EVIDENCE.
INDICTMENT.
INFORMATIONS.
JOINDER OF OFFENSES.
JUDGMENT.
JURORS AND JURY.
NEW TRIAL.
PENALTY.
PLEA.
PRACTICE IN COURT OF APPEALS.
RECOGNIZANCE.
SENTENCE.
STATEMENT OF FACTS.
THE "RULE."
VERDICT.

1. The proper way to supply written testimony of a witness before a coroner's inquest, but since lost, is to introduce witnesses who were present when the witness' testimony was taken before the inquest, and have them testify as to what was deposed. *Reyes* v. *State*, 1.

2. If exception was not taken to an erroneous charge when it was delivered, the error is not cause for reversal unless it was calculated to prejudice the rights of the appellant. The relevancy of the charge to the evidence adduced cannot be considered by this court when the record fails to bring up the facts in proof. *Williams* v. *State*, 8.

3. The Revised Code of Procedure, art. 591, provides that all witnesses already under recognizance or served with process shall be thereby bound, on a change of venue, to appear before the court to which the cause is transferred. New process is not necessary. *Means* v. *State*, 16.

4. If testimony be objectionable as hearsay or because it presupposes the existence of better evidence, its competency must be challenged in the trial court, and cannot be primarily assailed on appeal. *Roth* v. *State*, 27.

5. Proposed jurors having qualified themselves on *voir dire*, the accused is not required to presume them guilty of perjury, and ex-

PRACTICE — continued.

tend his investigation. See the opinion for state of facts which will avoid the stringent application of the rule laid down in *Roseborough* v. *The State*, 43 Texas, 570; *O'Meally* v. *The State*, 1 Texas Ct. App. 180, and *Lester* v. *The State*, 2 Texas Ct. App. 423. *Armendares* v. *State*, 44.

6. From a final judgment for $20 or more, rendered on a recognizance or bail bond, an appeal may be taken or a writ of error sued out *in forma pauperis;* but in such case it is indispensable that the requirements of article 1401 of the Revised Statutes be complied with by making the "strict proof" therein prescribed. Affidavit that the appellant is "unable to give security for the costs of appeal" is not a compliance with those requirements, and is insufficient. *Currie* v. *State*, 90.

7. See the opinion for a collocation of the statutory provisions which regulate appeals and writs of error *in forma pauperis* from judgments on recognizances, bail bonds, and bonds taken for the prevention or suppression of offenses. *Id.*

8. The Code of Procedure, article 686, provides for the allowance of bills of exception in criminal actions, and requires the judge's signature thereto, "under the rules prescribed in civil suits." Note in the opinion the collocation of new regulations adopted in the revision of the Civil Statutes, and which are also applicable to criminal cases. *McDow* v. *State*, 98.

9. Objection to the evidence of the date of the commission of the offense should have been made at the time it was offered, or a subsequent motion to strike it out, and if overruled, might have been good ground for a motion in arrest of judgment, because it had not been legally rendered against the defendant. *Rountree* v. *State*, 110.

10. When an indictment contains more counts than one, and they charge distinct felonies, it is the right of the defendant, as soon as the prosecution has developed its proof, to require the State to elect on which count a conviction will be sought. The election should, as a general rule, be made before the defendant enters upon his evidence. *Simms* v. *State*, 131.

11. Whatever the former rule may have been, it is now settled that, to reproduce the testimony given at a former trial by a witness who has since died, the person called to prove it may state its substance, if unable to repeat its precise language. *Id.*

12. A person called to prove the testimony given at a formal trial by a witness who has since died may state its substance, if unable to repeat its words. *Avery* v. *State*, 199.

13. The defense is not confined to positive or direct evidence of the complicity of the State's witness, but may establish it by any

PRACTICE — continued.

character of evidence which would be admissible if the witness himself were on trial for the offense. *Dubose* v. *State*, 230.

14. When no special plea or independent exculpatory fact is relied on by the accused, and he confines his defense to a traverse of the issues tendered in the indictment, the burden of proof never devolves on him. *Id.*

15. The Code of Criminal Procedure provides that where a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment or information. *Mathews* v. *State*, 279.

16. In all cases where the verdict is for a minor degree of the offense charged in the indictment, the proof should meet the statutory definition of the minor degree. *Id.*

17. In this case the record recites that a motion was made to correct the judgment *nisi*, yet it does not appear that the principal was in court, or that he had been served with notice of the motion; nor does it appear that the motion was made until after the entry of final judgment, nor that the correction of the judgment was made in fact, though the motion seems to have been granted by the judge. Under such circumstances final judgment on a forfeiture of bail bond cannot stand. *Ellis* v. *State*, 324.

18. Objections to an indictment based upon erasures or interlineations can be reached under our Code only by exceptions to the form. Such exceptions should be framed for the want of any of the requisites or forms prescribed by article 420 of the Code of Criminal Procedure, subdivisions 2 and 3. *Dodd* v. *State*, 370.

19. If the interlineations were made after the indictment was presented by the grand jury, it would appear that such indictment was not presented in the District Court by, and was not in fact the act of a grand jury, and such exceptions could be taken only under the subdivisions quoted. But if by reason of interlineations and erasures admitted to have been made by the grand jury the objection could be maintained that the offense was not set forth in plain and intelligible language, such exception could also be reached under subdivision 7 of article 420. *Id.*

20. However reprehensible as a question of practice may be a ruling of the court in a dispute over privilege of counsel in argument, if such ruling inures to the benefit of the defendant, he cannot be heard to complain. *White* v. *State*, 381.

21. But, on the other hand, if the argument addressed by counsel to the court upon a disputed question of law, is resorted to merely for the purpose of inflaming the passions of the jury, it is the duty of the court to interfere by peremptory order. *Id.*

22. Whenever a question as to the admissibility of evidence is to

PRACTICE — continued.

be discussed alone before the judge, the jury should be retired for the time. *Id.*

23. Failure to qualify as a witness with regard to the general reputation of another witness in the neighborhood for truth and veracity, the impeaching witness was properly held incompetent. *Trammell* v. *State*, 467.

24. But during his preliminary examination as to his means of knowledge, the witness stated that the reputation of another witness was bad. *Held*, that the court erred in refusing to withdraw the statement from the jury, or to instruct the jury to disregard this statement of the proposed impeaching witness. *Id.*

25. On the trial of an accused charged with theft of a mare, a witness for the defendant was asked if he did not direct the accused to go and get the mare and bring her to him; which question was objected to by the State on the ground that the "witness had no right to direct the accused to steal the mare." When the objection was interposed the trial judge asked defendant's counsel: "Do you propose to prove that witness directed him to steal the mare?' The question to the witness was excluded, and to its exclusion an exception was taken, but no exception was then taken to the remark of the judge, though after conviction it was embodied in a bill of exceptions, and was assigned for error. *Held*, that such matters should be saved by exceptions properly taken at the time, otherwise this court will not reverse unless it be apparent that the accused was injured by the remark of the judge. *Copeney* v. *State*, 473.

26. It is objectionable practice for a trial judge, in passing upon any question of law arising in a case, to make any remarks or inquiries, in the hearing of the jury, which might appear to be the expression of an opinion as to the facts. *Id.*

27. When, as in this case, it appears that the court was limited to a single week in which to dispatch its business,— that one of its rules was to give preference to jail-cases,— and that the defendant was the only person confined for trial (all others being on bail), this court will not reverse because he was forced to trial before others whose cases had precedence on the docket, unless it appears that he suffered injustice thereby. *Wright* v. *State*, 476.

28. Art. 661 of the Code of Criminal Procedure provides that evidence essential to the due administration of justice shall be received at any time before the conclusion of argument. If the admission of the evidence was necessary to the due administration of justice, the court had no discretionary authority to exclude it. *Hewitt* v. *State*, 501.

29. Objections to the service of the special *venire* must be taken at the proper time in the court below, and, to authorize an

PRACTICE — continued.

inspection by this court, the facts must be presented by proper bill of exception. *Williams* v. *State*, 528.

30. When it appears that the defendant himself, upon the cross-examination of a State's witness, elicited objectionable or immaterial evidence, he cannot be heard to complain of evidence of similar import adduced by the prosecution. *Jones* v. *State*, 552.

31. A defendant on trial for an offense which admits of degrees, cannot be heard to complain that he was convicted of a lower grade of offense than the evidence would have warranted. *Campbell* v. *State*, 560.

32. Testimony taken on an examining trial before a magistrate is required by the Code to be reduced to writing, signed by the witness and certified by the officer. And where this is required the law presumes that the magistrate performed his duty; and if he did parol evidence of what thewitness said cannot be received. *O'Connell* v. *State*, 567.

33. But if it be shown that the evidence was not reduced to writing, or if the written examination, by reason of irregularity, is wholly inadmissible, parol evidence of what was disclosed is admissible. If uncertain whether or not it was reduced to writing, the presumption that the officer discharged his whole duty obtains, and parol evidence will be rejected. *Id.*

34. Ordinarily expert witnesses, and witnesses who are attorneys in the case, and those called to testify to a witness' reputation for truth and veracity, are exempt from the "rule." *Johnson* v. *State*, 571.

35. But where, as in this case, medical witnesses were not called as experts, but merely as witnesses to give their evidence of the mental capacity of the defendant derived from a personal acquaintance with him, their subjection to the operation of the rule was not error. *Id.*

36. No objection having been taken at the time to the action of the court in the appointment of a foreman of the petit jury, and no prejudice appearing to have resulted therefrom, this court will not entertain this objection. *Post* v. *State*, 579.

37. See the opinion *in extenso* for a charge upon circumstantial evidence *held* to be a charge upon the weight of evidence, but which, being neither excepted to by the defendant nor operating to his prejudice, constitutes no cause for reversal. *Id.*

38. The residence beyond the jurisdiction of this State of a witness may be proved as other facts in the case, and no formal, independent oath to that effect is necessary in order to lay a predicate for the introduction of his written testimony. *Id.*

39. When a deposition is taken before an examining court or a jury of inquest, and is reduced to writing and certified according to

PRACTICE — continued.

law, the defendant being present and the privilege of cross-examination afforded him, and it is shown that since the deposition was taken the witness has died or removed beyond the limits of the State, or has been prevented from attending court by reason of age or bodily infirmity, or through the act or agency of the defendant, or by the act or agency of any person whose purpose it was to deprive the defendant of the benefit of the testimony, the deposition is admissible. See the opinion *in extenso* on the subject. *Id.*

40. If, upon request of the jury, in explanation of his instructions, the judge gives an additional charge, confining it to the subject matter of the request, he commits no error. He cannot, however, go beyond the request. *Post* v. *State*, 598.

41. The defendant failing to call in question, either by bill of exception or in his motion for new trial, the action of the trial court in giving or refusing charges asked, and no prejudice to appellant being shown, this court will not disturb the judgment on that account. *Id.*

42. The law regulating the organization of juries in criminal trials does not confide to the trial judge a discretionary power to excuse a juror summoned on a special *venire*, and such action on the part of the court is error notwithstanding the defendant did not interpose instant objection, and notwithstanding that he did not exhaust his peremptory challenges. *Hill* v. *State*. 618.

43. Before the State had concluded its evidence, and after the motion of the accused to suppress the alleged forged instrument as evidence, the court permitted the counsel for the State to dismiss the prosecution under the indictment, and held the accused in custody to enable the State's counsel to file a complaint sufficient to charge the accused with the offense attempted to be set out in the indictment. *Held*, that the court did not err. *Rogers*, *Ex Parte*, 655.

44. Bills of exception, to be considered for any purpose on appeal, must be prepared and certified during the term of the trial court at which they are taken. But, if the trial court, by special order entered of record during the term, allows the statement of facts to be prepared and filed within ten days after the adjournment, as it may now do, exceptions to evidence admitted over objection may be embodied in it. See the opinion for a collocation of the Rules of Court and statutory provisions which control this matter. *Keeton* v. *State*, 686.

45. After an appeal has been perfected, jurisdiction of the case passes out of the trial court and attaches to this court, and hence any attempted correction of the record by the court below after appeal has been perfected, cannot be considered by this court for any purpose whatever. *Gerard* v. *State*, 690.

PRACTICE IN COURT OF APPEALS.

See BILLS OF EXCEPTION.

PRACTICE.

STATEMENT OF FACTS.

1. There being two contrary theories advanced on the trial and supported by evidence, and the jury having given credence to that of the State, and the trial judge having refused a new trial, this court will not disturb the verdict. *Bright* v. *State*, 68.

2. On his trial for aggravated assault the defendant asked an instruction on simple assault, but the court below refused it on the theory that a conviction for simple assault could not be had. It being apparent that the ruling may have been prejudicial to the defendant, this court sets aside the conviction notwithstanding no statement of facts appears in the record. *Harrison* v. *State*, 93.

3. The variance is material when it appears that the judgment imposed a more severe penalty than that assessed by the verdict of the jury. But the judgment may be reformed by this court. *Rivers* v. *State*, 177.

4. The enforcement of the rule to sequester the witnesses rests in the discretion of the trial judge, and his action will not be revised on appeal unless abuse of that discretion to the appellant's prejudice be made apparent. *Avery* v. *State*, 199.

5. The record on appeal must show that the jury were sworn. *Berry* v. *State*, 315.

6. To the rule that errors in misdemeanor cases will not be revised when exception was not reserved in the trial court, an exception obtains if radical error to the appellant's prejudice is apparent of record. *Marks* v. *State*, 334; *Willis* v. *State*, 493.

7. This court will not revise the action of trial courts with reference to matters confided to their sound discretion, unless prejudice to the defendant is shown to have resulted from an abuse of such discretion. *White* v. *State*, 381.

8. Judgment upon a plea of guilty will be reversed unless the record shows that the defendant was admonished by the court as to the consequences of such plea, and that he was sane and uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt. *Wallace* v. *State*, 407.

9. The erroneous admission of evidence which is neither pertinent nor material to an issue in the case, and which could have no tendency whatever to affect or prejudice the rights of the defendant, is not cause for reversal. *Post* v. *State*, 579.

10. In passing upon the refusal of a continuance asked on account of the absence of a witness, the evidence adduced on the trial is likewise considered by this court for the purpose of determining whether the desired testimony was probably true, as well as whether it was material if true. *Aiken* v. *State*, 610.

PRACTICE IN COURT OF APPEALS—continued.

11. When the sentence of the court is not in conformity with the verdict of the jury and the judgment entered thereupon, and the record discloses no other error, this court will not reverse and remand the case, but will reform the sentence so as to conform to the verdict and judgment. *Hill* v. *State*, 673.

12. An unauthenticated bill of exceptions will not be considered by this court for any purpose whatever. *Id.*

R.

RAPE.

1. In a prosecution for rape alleged to have been effected by means of "force and threats," the charge of the court is insufficient unless in defining "force" it defines it as "such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case." *Jones* v. *State*, 552.

2. When the rape is alleged to have been effected by means of "threats," the jury should be instructed that the threats used "must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case." *Id.*

REASONABLE DOUBT.

1. In a murder case the defense was an *alibi*, and the defendant's proof was to the effect that, at the time of the homicide, he was with his brother at a ranche several hundred yards distant. Besides charging the reasonable doubt on the entire case and on the general question of the defendant's presence at the place and time of the homicide, the charge applied it specifically to the defendant's proof. *Held*, that this did not restrict the scope of the defense of *alibi*. *Means* v. *State*, 16.

2. If the inculpatory evidence consists of or substantially depends upon the uncorroborated testimony of a State's witness, and he is shown to have been an accomplice in the perpetration of the offense, a conviction cannot legally be had. And a reasonable doubt as to the complicity of the witness operates the same effect. *Dubose* v. *State*, 230.

3. When necessary, as it often is, that the jury be instructed on the doctrine of reasonable doubt as between the degrees of the offense charged, the instruction should be expressed in language comprehensible to non-professional men. *Eanes* v. *State*, 421.

4. After charging that, to convict, the jury must believe the defendant guilty beyond a reasonable doubt, the court further charged: * * * "if you believe from the evidence, beyond a reasonable doubt, that the defendant is not guilty as charged in the indictment, you will simply say so in your verdict." *Held*, error as

REASONABLE DOUBT — continued.

requiring the jury to believe the defendant's innocence beyond a reasonable doubt, before they could acquit him. Such a charge is fundamentally erroneous, though neither bill of exception nor statement of facts is brought up in the record. *Haynes* v. *State*, 480.

5. The doctrine of reasonable doubt applies to the general issue of guilty or not guilty, and it was not error to refuse a special instruction which attempted to apply it to each and every fact in proof. *Barr* v. *State*, 507.

RECOGNIZANCE.

See BAIL BOND.

Recognizance which recited the offense to be "unlawfully pursuing the occupation of selling medicated bitters in quantities of a quart and less than five gallons, without obtaining a license therefor," sufficiently describes an offense under the Revised Penal Code. Otherwise under the law anterior to the revision of the Codes. *Viser & Carson* v. *State*, 86.

RES GESTÆ.

See EVIDENCE, 1, 3.
MURDER, 21.

RETAILING LIQUOR.

See LOCAL OPTION LAW.
OCCUPATION TAX.
RECOGNIZANCE.
SUNDAY LAW, 3, 4.

ROBBERY.

1. Appellant was convicted of robbery on an indictment which alleged a sheep to be the property taken, but contained no allegation of the value of the animal. *Held*, that an allegation of the value was not necessary. *Williams* v. *State*, 8.

2. Proof that the money of which the party injured was deprived was forty dollars and of the value of forty dollars, will not sustain a conviction under an indictment which described the money as "forty dollars in current paper money of the United States, to wit: two ten dollar bills of the value of ten dollars each, and four five dollar bills of the value of five dollars each." *Mathews* v. *State*, 279.

S.

SELF DEFENSE.

1. In a trial for murder the theory of the defense was that the deceased and one F. had conspired to kill the defendant, and were present and co-operating to that end when he killed the deceased in self-defense. There was evidence tending to prove the presence and concerted action of the deceased and F., but whether the defendant knew that fact or was cognizant of a conspiracy to kill him was determinable only from the circumstances surrounding the

SELF DEFENSE — continued.

parties at the time of the killing. *Held*, that the charge to the jury should not have ignored the participancy of F., or have conditioned the defendant's right of self-defense on the hostile demonstrations of the deceased alone, but should have recognized the right of the defendant to kill either the deceased or F. if it reasonably appeared to him that they were then present and acting together to take his life. *McLaughlin* v. *State*, 340.

2. The citizen is authorized to stand upon his individual right, to oppose force to force in the prevention of an attempted wrong, and when he is threatened with unlawful arrest, he may not only use force, but can increase that force even to the killing of his adversary, if necessary to prevent the attempted wrong, and be held excusable. See the opinion *in extenso* on the subject. *Ross* v. *State*, 455.

3. The general principle is that when one's person or property is unlawfully assailed, he is not required to yield in the least, but in all cases may stand upon his rights, taking care not to resort to greater violence than is necessary for their protection. *Id.*

4. To the same extent as he who is threatened with violence to his person or property, his brother may, in his behalf, resist the execution of the unlawful purpose. *Alford* v. *State*, 8 Texas Ct. App. 545, cited and approved. *Id.*

SENTENCE.

1. If, upon the conviction of the same defendant at the same term of court for more than one offense, the punishment assessed in each conviction be confinement in the penitentiary, judgment and sentence shall be rendered and pronounced in each case as though there had been but that one conviction, but the judgment in the second or a subsequent conviction shall be that the punishment shall begin only when that adjudged in the preceding case has ceased to operate. The rule laid down in *Prince* v. *State*, 44 Texas, 480, has been superseded by the Revised Code of Criminal Procedure, art. 800. *Shumaker* v. *State*, 117.

2. Upon a conviction for bigamy wherein the punishment assessed was one hour's confinement in the penitentiary, sentence was pronounced against the accused. After one hour had expired, the accused, never having been incarcerated in the penitentiary, applied for his discharge under a writ of *habeas corpus*, claiming that he was entitled thereto by virtue of art. 825, Code Crim. Proc., which provides that the term of imprisonment in a conviction for a felony shall commence from the time of sentence. *Held*, that notwithstanding the provision of the article referred to, the term of imprisonment of the accused could not commence until he is actually delivered to the penitentiary authorities, and placed in confinement inside of the penitentiary walls. *Sartain* v. *State*, 651.

SHEEP INSPECTION.

1. The act of March 25, 1879, entitled "An act to protect the wool-growing interests of the State of Texas," provides for the appointment of inspectors in certain counties, and defines their duties. Section 5 of the said act provides that whenever an inspection of any flock or herd of sheep is had, under the provisions of the act, and such inspection discloses the presence of "scab" or other infectious or contagious disease, it shall become the duty of the inspector to notify at once the owner or person in charge, and prescribe certain limits within which the said flock shall be herded until cured. *Troy* v. *State*, 319.

2. Section 10 provides that "any owner or person in charge of sheep who shall wilfully or knowingly fail to comply with or shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten nor more than one hundred dollars." (See Rev. Stats. Appendix, pp. 18 and 19.) *Id.*

3. The material questions of fact in this case being whether or not the sheep of the appellant were infected with "scab," and whether or not the appellant violated the act in relation thereto, the charge of the court should have submitted these issues to the jury. *Id.*

STATEMENT OF FACTS.

1. The trial judge at any time during the term of court, whilst in control of the record, is authorized, upon a proper representation that an error of omission or commission appears in the statement of facts, to correct the same according to the truth of the matter. *Stephens* v. *State*, 120.

2. After the statement has been agreed to, certified and filed, such correction should never be made except in most palpable cases of error, or upon the most satisfactory proof of the same. See the opinion for an instance wherein the court did not err in making the addenda complained of. *Id.*

3. The judge before whom the case was tried is the only person who can authenticate the statement of facts. *Graham* v. *State*, 684.

4. By the record it appears that the regular judge of the court held the term at which the conviction was had, and his official signature is appended to the charge given to the jury. Instead, however, of his signature or approval appearing to the entry which purports to be the statement of facts, that entry is certified by another person as "special judge," and this anomalous proceeding is unexplained. *Held*, that the entry cannot be considered a statement of facts. *Id.*

SUNDAY LAW.

1. Indictment, in order to charge an offense under art. 186 of the Penal Code, should allege that the accused was either a mer-

SUNDAY LAW — continued.

chant, a grocer, or a dealer in wares and merchandise, or a trader in a lawful business, as the case may be. *Archer* v. *State*, 482.

2. If there be an exception in the enacting clause of a statute, such exception must be negatived, and though this be necessary, yet, if the subject-matter of the negative averment lies peculiarly within the knowledge of the accused, the averment is taken as true unless disproved by the accused. *Id.*

3. Prosecutions for selling liquor on Sunday do not, however, come within the exception. The allegation that the accused was "a dealer" does not occupy the position of a proviso or exception, but is an essential affirmative allegation, and must be proved. *Id.*

4. Proof that the accused was merely a clerk in the saloon will not sustain the allegation that he was a dealer. *Id.*

SURPLUSAGE.

See INFORMATIONS, 3.
NEW TRIAL, 8, 9, 10.

SWINDLING.

1. Evidence that the property appropriated was of the value of fifteen dollars will not support a verdict finding the defendant guilty of swindling to an amount exceeding twenty-five dollars, and therefore of felony. *Mathews* v. *State*, 279.

2. Swindling is defined to be the acquisition of personal or movable property, money, or an instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same. *Id.*

3. But in order to constitute the offense some false representation as to existing facts or past events must have been made. Mere false promises or false professions of intention, although acted upon, are not sufficient. *Id.*

4. See evidence *held* insufficient to support a verdict for swindling, and *held* also not to warrant a charge of the court on that offense. *Id.*

T.

TAX LAW.

See OCCUPATION TAX.

Article 113 of the Penal Code, whereby penalties are provided for persons who refuse to render their property for assessment, or to swear to the list rendered, etc., must be construed in connection with the provisions of the Civil Statutes which prescribe the duties in this regard of all owners and holders of taxable property. Therefore an indictment based on said article 113 should allege the year for which the defendant's taxable property was assessable. *Berry* v. *State*, 315.

THEFT.

See EMBEZZLEMENT.
EXTRADITION.
SWINDLING.

1. Theft may be prosecuted either in the county where the property was taken or in any other county through or into which it was carried by the thief. *Roth* v. *State*, 27.

2. If the prosecution be in a county other than that in which the theft was committed, and the evidence shows that the value of the stolen property was enough to make the offense a felony, but that the value of the portion carried into the county of the former was not enough to make the offense a felony, the conviction can be for misdemeanor only. *Id.*

3. Theft of a bank-note is sufficiently charged if the indictment charges theft of a "bank-bill,"— the latter being the statutory term in this State. *Id.*

4. Not only must there be a taking of the property of another without his consent, but the mind must intend a fraudulent taking with intent to defraud the owner of the value thereof; otherwise the offense of theft is not made out. Note the facts of this case in illustration. *Landin* v. *State*, 61.

5. A conviction for theft of certain oxen was had upon evidence from which the jury might have inferred that, though the defendant killed the oxen without their owner's consent, and afterwards skinned them and appropriated the hides, yet that he killed them because they were depredating on his crop, and with no intent to appropriate them or any part of them. *Held*, that the trial court should have distinctly instructed the jury that, in case they so found the facts to be, the defendant was not guilty of theft of the oxen. It was not sufficient to instruct that such a state of facts would warrant a conviction for the misdemeanor of killing live stock without the owner's consent, etc. *McPhail* v. *State*, 128.

6. If the property alleged to have been stolen came into the possession of the accused by lawful means, the subsequent appropriation of it is not theft; but, if the taking, though originally lawful, was obtained by any false pretext, or with intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete. *Hudson* v. *State*, 215.

7. Theft is among the offenses consisting of different degrees, and includes swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code. *Mathews* v. *State*, 279.

8. It being enacted in this State that the offense of theft comprises all unlawful acquisitions of personal property, it is well settled that a conviction for receiving or concealing stolen property

THEFT — continued.

may be had under a general indictment for theft of the property. (HURT, J., dissenting.) *Vincent* v. *State*, 380.

9. In a trial for receiving stolen property, the jury might, under the proof and their instructions, have convicted the defendant either of a felony or a misdemeanor, according to the value of the property. Without specifying the value of the property, the jury found a general verdict of guilty, and assessed a felonious punishment. *Held*, a good verdict. *Id.*

10. To sustain an accusation of theft of animals, ownership can be proved independent of a bill of sale; and exclusive possession, care, management and control of such property is sufficient proof of ownership. *Dodd* v. *State*, 370.

11. In order to sustain a prosecution for theft, when the taking was originally lawful, the proof must show that the taking was obtained by some false pretext, or with the intent to deprive the owner of the value of the property and to appropriate it to the use and benefit of the taker, and, furthermore, that the same was so appropriated. *Hornbeck* v. *State*, 408.

12. When a party is first found in possession of recently stolen property, and his explanation is reasonable, natural and probable, the burden of showing its falsity is thrown upon the State. His statements in explanation are admissible in his own behalf if made when first arrested; and so, it seems, are such statements of his co-conspirator if made in his presence. *Wright* v. *State*, 476.

13. The indictment charged the theft of "one certain horse, the property of A," giving no further description, and the court permitted the witnesses to describe the horses of A found in defendant's possession. *Held*, that the court did not err. If the defendant had more than one of A's horses in his possession, and they were taken at or about the same time, the State could show it for the purpose of establishing identity in developing the *res gestæ*, or in making its proof by a chain of circumstances connected with the offense on trial, or for the purpose of showing motive or intent in the crime charged. *Id.*

14. The contest in this case being whether or not the animal alleged to have been stolen corresponded with the description given in a bill of sale made by the defendant, and not over the description given in the bill of sale itself, upon which witnesses for both sides agreed, its production as primary evidence was not essential. The bill itself was neither the best nor any evidence upon the issue involved. *Hailes* v. *State*, 490.

15. When in a trial for theft the defense is the insane propensity to steal known as kleptomania, and there is evidence tending to sustain that defense, the charge to the jury should distinctly present and specifically treat of the peculiar issue thus raised, and not stop

THEFT — continued.

with submitting the usual test of the defendant's ability in general to distinguish right from wrong. *Looney* v. *State*, 520.

16. See this case for evidence held insufficient to sustain a verdict of conviction for theft, wherefore a new trial should have been granted. *Ellis* v. *State*, 540.

17. Purchase in good faith from one having possession, and without knowledge or reason to believe that the animals were stolen, is a valid defense, and, such purchase being an issue in the case, a charge is deficient that fails to enunciate the law applicable to such defense. *Ruston* v. *State*, 644.

18. Appellant was charged with embezzlement as a "bailee" of certain funds "to be by him conveyed" to a designated place. *Quære:* Should not the prosecution have been for theft instead of embezzlement, conformably to article 788 of the Revised Penal Code, whereby embezzlement by a carrier is made theft? *Reside* v. *State*, 675.

19. In a trial for ordinary theft it is incumbent on the State to prove the value of the stolen property, notwithstanding it was currency such as the United States silver certificates. *Simpson* v. *State*, 681.

20. In a trial for theft of a heifer alleged to belong to an unknown owner the evidence showed that the animal, though an estray and the owner unknown, was in the possession of the person on whose premises it ranged. *Held*, that the jury should have been instructed that the want of that person's consent to the taking of the animal by the defendant must be proved to the satisfaction of the jury, by circumstantial evidence or otherwise. *Spruill* v. *State*, 695.

21. See evidence held insufficient to sustain a conviction for the theft of an estray. *Id.*

22. The statements of an accused when first found in possession of property recently stolen are admissible in his behalf, but his statements after he has parted with the property, and when he has not the possession of it, are not. He cannot be permitted to fabricate evidence for himself by his own declarations. *Childress* v. *State*, 698.

THE "RULE."

1. The enforcement of the rule to sequester the witnesses rests in the discretion of the trial judge, and his action will not be revised on appeal unless abuse of that discretion to the appellant's prejudice be made apparent. *Avery* v. *State*, 199.

2. To the trial court is confided the discretion of enforcing the "rule" against witnesses, and its action will not be revised by this court in the absence of a showing of abuse. *Johnson* v. *State*, 571.

THE "RULE" — continued.

3. Ordinarily expert witnesses, and witnesses who are attorneys in the case, and those called to testify to a witness' reputation for truth and veracity, are exempt from the rule. *Id.*

4. When medical experts are called solely as such the better practice is to exempt them from the "rule," in order that they may hear the whole evidence touching the matter respecting which they are called to testify; but where this is not done an hypothetical case embracing the facts in evidence may be submitted for their opinion. *Id.*

5. But where, as in this case, medical witnesses were not called as experts, but merely as witnesses to give their evidence of the mental capacity of the defendant derived from a personal acquaintance with him, their subjection to the operation of the rule was not error. *Id.*

THREATS.

See RAPE, 2.

TRAVELERS.

See CARRYING WEAPONS, 1.

TREATIES.

See EXTRADITION.

V.

VARIANCE.

See EVIDENCE, 74.

1. Indictment charged theft of a note on the "Chatam National Bank," but the note as proved and exhibited was on the Chat*h*am National Bank. *Held idem sonans,* and not a material variance between the alleged and the proved appellation of the bank. *Roth* v. *State,* 27.

2. Where, as in this case, there are expressions in the complaint not used in the information, but which, if treated as surplusage and stricken out, would leave the complaint complete, the variance is not fatal. *Meier* v. *State,* 39.

3. The indictment charged the theft of certain cattle, the property of "J. P. and A. C." The bail bond described them as the property of J. P. *Held,* a fatal variance. *McAdams* v. *State,* 317.

4. When it appears that the judgment *nisi* is against the surety alone, and the *scire facias* recites a judgment against both the surety and the principal, the variance is fatal. *Ellis* v. *State,* 324.

5. When an indictment for forgery purports to set out the forged instrument according to its tenor, and in *hæc verba,* any variance as to the words of the instrument, unless the variance be mere fault of spelling, is fatal to the indictment. *Rogers, Ex Parte,* 655.

VENUE.

1. Theft may be prosecuted either in the county where the property was taken or in any other county through or into which it was carried by the thief. *Roth* v. *State*, 27.

2. Proof that the offense was committed within one hundred and twenty-five yards of a point located by the evidence within the body of the county is sufficient proof of the venue of the offense. *Willis* v. *State*, 493.

3. An offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either, and the indictment may allege the offense to have been committed in the county where it is prosecuted. *Id.*

VERDICT.

1. The variance is material when it appears that the judgment imposed a more severe penalty than that assessed by the verdict of the jury. But the judgment may be reformed by this court. *Rivers* v. *State*, 177.

2. "We the jury find the defendant guilty of a misdemeanor, and assess his punishment at one hundred dollars," is a verdict entirely insufficient to support a judgment, and a motion in arrest based thereon should prevail. *Howell* v. *State*, 298.

3. Unless something appears to the contrary, it is presumable that the jury expressed their findings responsively to the instructions given them by the court; wherefore, in determining questions involving the import of the verdict, the charge of the court is to be looked to and considered. *Vincent* v. *State*, 330.

4. In a trial for receiving stolen property, the jury might, under the proof and their instructions, have convicted the defendant either of a felony or a misdemeanor, according to the value of the property. Without specifying the value of the property, the jury found a general verdict of guilty, and assessed a felonious punishment. *Held*, a good verdict. *Id.*

5. The entry in a misdemeanor case recited a verdict found by "a jury of good and lawful men, to wit, P. H. Ebner," and that name was signed to the verdict as foreman. *Held*, that no presumptions can be indulged in aid of the entry or verdict, which import a jury composed of but one man. *Marks* v. *State*, 334.

6. *Quære*, whether the provision of the Revised Code of Procedure that the verdict in a felony case must be signed by the foreman is only directory? But that is the better practice in felony cases. *Id.*

7. When the sentence of the court is not in conformity with the verdict of the jury and the judgment entered thereupon, and the record discloses no other error, this court will not reverse and remand the case, but will reform the sentence so as to conform to the verdict and judgment. *Hill* v. *State*, 673.

W.

WEIGHT OF EVIDENCE.
See Charge of the Court, 2, 3, 6, 10.

WITNESS.
See Continuance.
Evidence, 2, 11, 12.
Pardon.
Practice.
The "Rule."

Ex. J. A. A.

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